

Chapter 4: MANNER OF RECORDING
(By University of Southern California)

I. INTRODUCTION

An instrument must be properly recorded in order for the benefits of recording to apply. If it is improperly recorded, generally it will be treated as if it had never been recorded. There are a few situations in which protection will be given even though some error has occurred in the recording process, but it is only in a situation where a subsequent purchaser would not be misled by the error.

Since proper recording is a prime requisite for the benefits of recording it is necessary to discuss the actual recording process in order to understand what proper recording consists of.

II. WHEN IS AN INSTRUMENT RECORDED?

The first problem which is presented is when is an instrument actually "RECORDED"?

Section 1170 of the Civil Code provides: "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record."

However, Civil Code Section 1213 requires that the instrument be properly recorded before it will operate as constructive notice to subsequent parties. Proper recording in that statute requires proper filing, indexing, and transcribing. The court in Cady v Purser, (1) construing Sections 1170 and 1213 together, concluded that an instrument is not actually recorded until it has been properly filed, transcribed and indexed. When it has thus been properly recorded, the beneficial effects of recording will follow. The purchaser will then be protected against purchasers who record subsequently.

When the instrument is not properly recorded, due to an error of the recorder in transcribing or indexing, the grantee who filed the instrument for record must suffer the loss. If the instrument is not transcribed and indexed he will not have preserved the common law priority he had and will not be protected against subsequent parties. In addition, the record will not give constructive notice to subsequent parties. This is the way most courts discuss the situation, but it is sufficient to say that the common law priority is not maintained without discussing constructive notice. The basis for the rule is that unless the instrument is put into the proper place and indexed properly, a subsequent purchaser could not find the record. He will only take subject to those instruments which he could reasonably be expected to find.

A special situation arises when the instrument is copied into the wrong book, but properly indexed so that a purchaser checking the index would find out about the instrument and be able to discover it from the

reference contained in the index. This is covered by Government Code Section 27327 which states as follows:

"Any instrument filed for record in the office of the county recorder of the county where it is entitled to record and which is copied into a book of record other than that designated by law, but which is thereafter indexed in the proper book of indices, imparts notice of its contents to all persons from the date of such indexing, and any subsequent purchaser, mortgagee, lien-holder and encumbrancer purchases and takes with the same notice and effect as if the instrument were copied or recorded in the proper book of record."

Although the statute merely requires indexing in the proper book of indices, it would also be required that the instrument be properly indexed, since that is part of the recording process.(2)

There is a question as to whether a purchaser would be put on notice if the index contained the wrong reference to the book and page where the instrument is recorded. If it were recorded in Volume 5 of the Book of Deeds, page 5, but the index made a reference to Volume 5 of the Book of Deeds, page 10, it would seem that the purchaser could find the instrument by examination of Volume 5 of the Book of Deeds. If the reference were to the wrong book number when there are several books of deeds it would be difficult for the purchaser to check all the books of deeds. It would seem, therefore, that when the courts state that proper indexing is a necessity for proper recording that the reference to the book and page where the instrument is recorded would have to be correct. Any other holding would put a hardship on the purchaser searching the records.

There is, however, an argument that finding a reference of any kind would put a purchaser on inquiry and he would have to make a reasonable investigation and attempt to find the instrument which is indexed, but which contains an inaccurate reference to the book and page where the instrument has been copied.

This problem could arise whether the instrument were copied into the proper book or into the wrong book.

These problems should be distinguished from the situation in which the instrument is copied into the proper book and indexed properly, but an error has occurred in copying. The courts have generally held that the instrument will give constructive notice only of the contents of the instrument as it is copied in the record books. It will not be notice of any provision which has been omitted in copying. If the instrument covers lot #6, but the recorder makes an error and copies it as lot #5, a subsequent purchaser of lot #6 will take free of that instrument, since the record only gave him notice of an instrument which covered lot #5, but not lot #6.

However, if the error is immaterial the purchaser will not be charged with notice of the contents of the instrument as copied. He will then be

charged with notice of the correct statement as it appears in the original document. This is a modern trend developed by the courts as a practical solution to the problem. It does require a purchaser to look behind the record as it appears in the record books in certain instances. This problem is discussed in Chapter 8 more in detail.

II. THE RECORDING PROCESS

A. FILING THE INSTRUMENT

The first step in the recording process consists of a proper filing. This requires that the instrument be deposited with an officer authorized to accept such instrument for record and it must be deposited at his office.(3) Delivery at any other place is insufficient.(4) It has been held to be a valid delivery when the instrument was filed after office hours with the proper officer at his office.(5) It is not proper to leave the instrument in the office after office hours without giving it to the proper officer.(6) It is not necessary to deposit the instrument in person. It may be filed by an agent or attorney.(7)

If improperly filed, it would seem that the instrument would not operate as notice even though properly transcribed and indexed. If the instrument were filed with someone not authorized to receive it, the filing would be invalid and the instrument would be treated as if not recorded. The grantee would then be unable to set the instrument up against a subsequent bona fide purchaser who recorded properly without actual notice of this instrument.

B. ENDORSEMENT

The first duty of the recorder is to endorse the filing number, time of reception of the instrument and the amount of fees on the instrument.(8) This must be done by the proper officer or the instrument will not be properly recorded and the benefits of recording will not accrue.(9)

There is a problem in connection with the filing numbers. These numbers are consecutive and are stamped on the instruments in the order in which they are filed. If an error is later made and the filing number which is copied on the record of the instrument is copied incorrectly, the number as copied into the record books will control. The basis for this is that a purchaser may rely on the record as it appears in the record book when there is a conflict between that and the filing number, which is endorsed on the instrument.(10) If there is an error the grantee under the first instrument will suffer the loss. It would be too much of a burden to force the subsequent purchaser to check on the correctness of the filing number copied into the record books. The priority in that case is determined by the number in the record whether correct or not.

C. TRANSCRIBING

The recorder has an option of keeping one series of books, in which he copies all instruments, or of keeping separate books for each class of

instrument.(11) If he keeps one series that is called the "official records." Government Code Section 27322 lists the books which the recorder may keep if he prefers keeping separate books for each type of instrument.

In addition to these provisions, there are several code sections which provide for separate books which the recorder may keep if he prefers. These include:

- (1) A book entitled "certificates of sales" in which are recorded certificates of sales under execution. Political Code 4133.
- (2) Civil Code Section 1421 requires the recorder of each county to keep a book in which he must record the notices of appropriation of water.
- (3) Section 1189 of the Code of Civil Procedure requires the recorder to record mechanics' liens in a book kept for that purpose.

It would seem from Government Code Section 27323 that it would not be necessary for the recorder to keep these instruments in separate books in spite of these individual code sections and they could be recorded along with the other instruments in the "official records."

A special book entitled "Record of Patents" must be kept however, according to Government Code Section 27264. This does not seem to be optional according to the code section.

Many instruments are filed with the recorder and left there. They must be kept in a separate place. The Recorder's Office of Los Angeles County keeps these instruments in a special file cabinet. They include the following:

- (1) Instruments proved by handwriting. The original must be filed in a special book. Government Code Section 27290.
- (2) Original instrument in a foreign language must be kept at the recorder's office and must also be recorded. Government Code Section 27293.
- (3) Notices of Internal Revenue tax liens payable to the United States and certificates discharging them must be filed in a special book. (GC Sections 27330, 27331, 27332).
- (4) Redemption certificates must be filed with the recorder and kept. Code of Civil Procedure Section 703.
- (5) Discharge of attachment. Code of Civil Procedure Section 559 requires a certified copy to be filed with the recorder and kept.

If the recorder uses a separate set of books for each type of instrument it is required that he copy the instrument in the proper book. If he fails to do this, it has been held that the record will fail to operate as constructive notice.(12) The actual effect it has is that the instrument will be treated as if not recorded. None of the benefits of recording will follow. It should not be limited to a statement that the record fails to give constructive notice.

After Cady v Purser had been decided holding that no constructive notice would result if an instrument was copied into the wrong book, Political Code Section 4135 (now Government Code Section 27327) was passed giving the record the effect of constructive notice if the instrument was indexed in the proper book, even though copied into the wrong book of record.

The copying must be by an officer authorized to do this or the record will not operate as constructive notice.(13) If the grantee deposits his instrument, but an improper officer copied it into the record books, the grantee will not be able to claim that his instrument has priority over a subsequent purchaser who had no actual notice of the existence of this instrument.

The instrument must be copied into the record books in a durable manner. Copying in pencil is not sufficient. Pasting a map between the leaves of a book is not satisfactory. Instruments put in in this manner are treated as if not recorded.(14) The person offering them for record must suffer the loss.

The copying of the instrument was formerly done in longhand, which was authorized by the statute. Subsequently, the statute permitted typing. A recent amendment to Government Code Section 27322 provides for the use of photographic processes.(15) This is the method now used by the County Recorder's Office of Los Angeles County. Government Code Section 27230 now allows the recorder to use books which contain printed forms of the documents in general use to save the copying of some provisions which are frequently contained in these instruments. This would not be necessary if photography is used, of course.

At the bottom of the record of the instrument the recorder makes a notation of the filing number, the time of deposit of the instrument, and the name of the person requesting the instrument to be recorded. At the same time he endorses on the instrument the time, book and page in which the instrument has been copied.(16)

D. INDEXING

Again, the recorder is given the option of the type of indices he prefers to keep. He may keep two indices:

- (1) A General Index of Grantors.
- (2) A General Index of Grantees.(17)

These are the indices that are usually kept.

In the grantor index, the recorder keeps an alphabetical list of all grantors, mortgagors, and other parties who have executed and recorded instruments affecting land which they have an interest in.

In the grantee index, the recorder keeps an alphabetical list of all grantees, mortgagees, and other persons who have acquired interests in real property by recorded instruments.

At the present time, Los Angeles County has a completely alphabetized list of grantees and grantors for each year since 1946. Before 1946 the system was slightly different. A partially alphabetical and partly chronological system was used. The indices were divided into various alphabetical groups such as Hil-Him and all grantees and grantors (depending on which books are involved) whose names began with Hil to Him were put in this section, chronologically. Therefore, to find any conveyances to or by HILL it would be necessary to check through the entire section of Hil to Him in the grantee and grantor books for each year the purchaser is interested in.

The present system has a completely alphabetized list for the period of one year which aids the purchaser in searching.

The recorder may prefer to keep special indices for each type of instrument. If he does this he will have an index of grantors and an index of grantees for deeds; an index of mortgagors and an index of mortgagees for mortgages; and indices for other types of instruments. Provision for these various indices is found in Government Code Sections 27232-27256.

The information which is put in the index is as follows:

- (1) Names of the parties to the instrument.
- (2) Title of the instrument.
- (3) Date of filing.
- (4) Reference to book and page where the instrument has been recorded.

There is no provision for the legal description of the property to be inserted in the index. This causes a serious difficulty in title searching. It means that a purchaser who is searching the record title must look at the record of each instrument that his grantor was a party to in order to discover whether it involves the piece of property he is interested in purchasing. This becomes extremely burdensome when he has to check up on all conveyances made by all grantors in the chain of title to this particular piece of property. If the index contained a legal description it would assist the purchaser in searching his title.

The recorder is required to index the instrument as the parties request, but may do it as he pleases if there is no specific request. (18)

There are some special provisions regarding the manner of indexing

which should be mentioned at this point.

Government Code Section 27263 provides that "When a conveyance is executed by a sheriff, the name of the sheriff and the party charged in the execution shall both be inserted in the index. When an instrument is recorded to which an executor, administrator, or trustee is a party, the name of the executor, administrator, or trustee and the name of the testator, or intestate, or party for whom the trust is held, shall be inserted in the index."

Government Code Section 27333 provides: "All conveyances of real estate, except patents issued by the State as a party, made by any public officer pursuant to law, when recorded shall be alphabetically indexed in the "Index of Grantors," both in the name of the officer making the sale, and in the name of the person owning the property so sold."

Government Code Section 27328 may be relied on to obtain indexing under various headings. It states: "Any instrument which is filed for record with the recorder as a deed, deed of trust, mortgage, or chattel mortgage, or which is copied into any book of deeds, deed of trust, mortgages, or chattel mortgages need not be again filed for record or recorded in such office as a different instrument, but the recorder shall index the instrument in any of the indices kept in his office upon the request of the persons recording it and the payment to him of the legal fees for indexing. He shall note at the foot of the actual record where the instrument is transcribed all the indices in which it is indexed....."

Government Code Section 27334 states: "If the name of the person in whom title to real estate is vested is changed from any cause, the recorder shall alphabetically index the conveyance in the "Index of Grantors," both in the name by which title was acquired and the name by which it is conveyed."

Code of Civil Procedure Section 542 provides that when real property is attached which belongs to the defendant but is held by any other person it must be indexed in the following manner: "The recorder must index such attachment when filed, in the names, both of the defendant and of the person by whom the property is held or in whose name it stands of record."

Political Code Section 4133 provides that the recorder may keep a special index for the "certificates of sales" record book. This section states: "He must also prepare an index thereto, in which, in separate columns, he must enter the names of the plaintiff in the execution, the defendant in the execution, the purchaser at the sale, and the date of the sale."

It would seem that these certificates could be recorded in the "official records" and indexed in the General Index if the recorder prefers.

There is a provision, Code of Civil Procedure Section 559, which provides for filing a copy of discharge of attachment. This section requires the

discharges to be indexed in like manner as notices of attachment are indexed. This would seem to require them to be indexed in the General Index if attachments are indexed in that manner.

Section 1189 of the Code of Civil Procedure provides that the record books containing mechanics' liens (if a separate book is kept for them) should be indexed as deeds and other conveyances are required by law to be indexed.

There are, however, some special indices which must be kept in addition to the General Index. These include:

- (1) Government Code Section 27331 provides: "When a notice of the tax lien is filed, the recorder shall forthwith enter it in an alphabetical federal lien tax index"

Government Code Section 27332 provides for the entering of a discharge of a tax lien in the index on the line where the notice of the discharged lien is entered.

- (2) Special indices are kept for the special books that are required. In Los Angeles County, papers which are filed with the recorder and remain there permanently, such as foreign instruments, certificates of redemption, et cetera, are kept in special containers. They are then indexed in a special book entitled "Unrecorded Maps and Miscellaneous Papers."

E. REDELIVERY

When the recording process is completed, the recorder delivers the instrument to the party leaving it for record or upon his order.(19) Of course, if it is the type of instrument that must be filed, it is left permanently with the recorder.

IV. INSTRUMENTS WHICH MUST BE RECORDED IN A SPECIAL MANNER

A. FICTITIOUS MORTGAGES AND DEEDS OF TRUST:

An amendment to Civil Code Section 2952, added in 1947, provides for the recordation of "dummy" mortgages and other instruments.(20) These need not be acknowledged or certified, but must note on the face that they are fictitious. These are then recorded in the same manner as other mortgages and deeds of trust and indexed. It must be noted on the record and index that these instruments are fictitious. Later, the mortgages and deeds of trust which are recorded by the parties recording this fictitious mortgage may refer to provisions of the dummy instrument which is on file and include them in the instrument which is being recorded without setting forth these provisions in full. The reference must contain a statement of the date the fictitious mortgage or deed of trust was recorded, the recorder's office in which it is recorded, and the book or volume and page or pages of the records in the recorder's office where it is recorded. It must

also contain a statement by paragraph numbers or any other method which will identify it, of the specific provisions of the fictitious mortgage which are being adopted. The statute provides that the instrument including the material incorporated will operate as constructive notice. This provision has reduced the expense connected with recording a series of such instruments. (21)

In 1949 another amendment followed which made it possible to record a fictitious instrument with a provision on the instrument notifying the recorder not to record certain conditions which are in the instrument and appear either on the same or reverse side. (22) This had been the practice before this amendment and was held proper in 13 Ops. Cal. Atty. Gen. 185 (1949). This opinion established that instructions could be given to the recorder to record certain provisions and omit certain other ones and the recorder would be under an obligation to do what the parties requested, provided that the instrument is otherwise entitled to be recorded.

These amendments are discussed in 23 Southern California Law Review at page 35 and the writer points out the advantage of such provisions. He states: "Thus, rather than print such provisions on separate pages in order to supply the debtor with a copy of them, a creditor may now print them on the same paper on which the recorded instrument appears." An example of provisions which would probably be omitted from the record by request of the parties would be a copy of the note which is included on the same paper as the mortgage or deed of trust, but which would not require recordation. By instructing the recorder not to record the note, it would be possible to have it on the same page and it would not be necessary to have a separate copy of it on a different paper for the debtor's copy.

E. DISCHARGES, RELEASES, SATISFACTION OF CERTAIN INSTRUMENTS

(1) Discharge of Mortgage:

Civil Code Section 2938 provides for the manner of discharging a mortgage. "A recorded mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the recorder, who must certify the acknowledgment in form substantially as follows: "Signed and acknowledged before me this... day of ..., in the year... AD, Recorder."

Civil Code Section 2939 gives an alternative method of discharge: "A recorded mortgage, if not discharged as provided in the preceding section, must be discharged upon the record by the officer having custody thereof, on the presentation to him of a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged or proved and certified as prescribed by the chapter on 'recording transfers,' stating that the mortgage has been paid, satisfied, or discharged. Reference shall be made in said certificate to the book and page where the

mortgage is recorded."

Civil Code Section 2939 $\frac{1}{2}$ provides for satisfaction of mortgages by foreign executors, administrators and guardians.

Civil Code Section 2940 provides that "A certificate of the discharge of a mortgage, and the proof or acknowledgment thereof, must be recorded at length, and a reference made in the minute of the discharge made upon the record of the mortgage to the book and page where the discharge is recorded."

Whenever a mortgage is foreclosed it is the duty of the sheriff "to enter upon the margin of the county records where such mortgage is recorded, if the same be recorded, a satisfaction of the same." This provision is Section 675a of the Code of Civil Procedure.

(2) Release of Attachment: CCP Section 560.

"An attachment as to any real property may be released by a writing signed by the plaintiff, or his attorney, or the officer who levied the writ, and acknowledged and recorded in the like manner as a grant of real property; and upon the recording of such release, it is the duty of the recorder to note the same on the record of the copy of the writ on records in his office. Such attachment may also be released by an entry in the margin of the record thereof, in the county recorder's office, in the manner provided for the discharge of mortgages under section 2938 of the Civil Code."

(3) Certificate of Redemption: CCP Section 703.

"Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale."

(4) Satisfaction of Judgment: CCP Section 675.

Satisfaction may be made in the margin of the record of the judgment. When an abstract of the judgment has been recorded a satisfaction may be recorded, "or an entry thereof may be made in the margin of the recorder's records, signed by the judgment creditor or assignee of record or by the attorney, unless a revocation of his authority is recorded."

(5) Request for Notice of Default under Mortgage or Deed of Trust: Civil Code Section 2924b.

"Immediately upon the filing for record of such request, the recorder shall enter upon the margin of the record of the deed of trust or mortgage therein referred to a reference to the place where such request is recorded, which reference shall be substantially in the following form:

"Request recorded in Book...page...of... for copy of notice of default and sale."

FOOTNOTES to CHAPTER 4: MANNER OF RECORDING

1. 131 Cal 552.
2. 220 Cal 629.
3. Edwards v Grand, 121 Cal 254.
4. Ibid.
5. Ibid.
6. White Co. v Winton, 41 Cal App 693.
7. Farley v Hopkins, 79 Cal 203.
8. Government Code Section 27320.
9. Smith v Brannon, 13 Cal 107.
10. Donald v Beals, 57 Cal 399.
11. Government Code Section 27323.
12. Cady v Purser, 131 Cal 552.
13. Smith v Brannan, cited supra, footnote #9.
14. Caldwell v Center, 30 Cal 539.
15. Beatty v Hughes (1943) 61 Cal App (2) 489 held photography was not authorized by the statute. This resulted in the amendment to Government Code Section 27322 allowing for "photography or any reproduction process." Cal. Stats. 1947, ch. 550, s. 2.
16. Government Code Sections 27320 and 27321.
17. Government Code Sections 27257-27261 cover the General Indexes and the form in which they are kept.
18. Government Code Sections 27324 and 27325.
19. Government Code Section 27321.
20. Cal. Stats. 1947, ch. 1497.
21. See discussion of this amendment in 23 Southern California Law Review at page 35.
22. Cal. Stats. 1949, ch. 443.

Chapter 5: PREREQUISITES TO RECORDING
(By University of Southern California)

I. INTRODUCTION

"Instruments" relating to real property which are authorized to be recorded under the general recording statute, Government Code Section 27322, are required to be acknowledged or proved and certified by the officer taking the acknowledgment or proof.

The question of what documents are "instruments" was discussed in a former chapter entitled "Instruments Which are Authorized to be Recorded". A document may be authorized to be recorded under specific statutes other than the general recording statute and whether an acknowledgment would be a necessary prerequisite would depend on the terms of the statute authorizing the recordation of that particular document. Examples of such documents are:

1. Homesteads.
2. Writ of Attachment.
3. Mechanics' Liens.

These documents and their necessary prerequisites will be discussed below.

If the specific statute authorizing recordation does not require an acknowledgment and the document is not qualified as an "instrument" within the definition of Civil Code Section 1215, no acknowledgment will be necessary as a prerequisite to recordation of that instrument.(1)

In addition, there are special code provisions, allowing certain documents to be recorded without any special prerequisites regardless of whether they are "instruments" in the technical sense or not.

It should be noted that certain documents require additional prerequisites, such as consent of the grantee or deposit of the original instrument to be retained by the recorder.

These various matters will now be considered in detail.

A. PREREQUISITES TO RECORDATION OF "INSTRUMENTS" UNDER THE GENERAL RECORDING STATUTE

Government Code Section 27287 provides for the steps that must be taken prior to the recording of an "instrument" under the general recording statute. This code section states:

"Unless it belongs to the class provided for in either Sections 2728a to 2728c, inclusive, or Sections 1202 or 1203, of the Civil Code, or is a fictitious mortgage or deed of trust as provided in Section 2952 of the Civil Code, before a document can be recorded its execution shall be acknowledged by the person executing, or if executed by a corporation, by its president or secretary or other person executing it on behalf of the corporation, or proved by a subscribing witness or as provided in Sections 1198 and 1199 of the Civil Code, and the acknowledgment or proof certified as prescribed by law."

Government Code Section 27288 requires agreements for sale, option agreements, deposit receipts, commission receipts, or affidavits referring to any of these to be acknowledged or proved in the same manner as provided in Government Code Section 27287 by the party who appears by the instrument to be the party whose real property is affected or alienated thereby. This refers only to agreements, options, etc. which affect an interest in real property.

Government Code Section 27289 requires the same preliminary formalities for assignments of agreements for sale, option agreements, agreements for leases, commission receipts or affidavits referring to any of these. This, however, does not pertain to an assignment made by or contained in any deed of trust, mortgage or other liens given to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or made by a public utility subject to the provisions of the Public Utilities Act.

The code sections discussed so far relate merely to documents which are "instruments" within the definition of Civil Code Section 1215.

E. PREREQUISITES TO RECORDATION OF DOCUMENTS UNDER SPECIFIC STATUTES

Various documents which are not classified as "instruments" may nevertheless be authorized to be recorded by specific statutes which provide for certain prerequisites to recordation. Some of these statutes are as follows:

1. Assignment for Benefit of Creditors:

These must be acknowledged, proved and certified in the same manner as a transfer of real estate. Civil Code Section 3458.

2. Homesteads:

"In order to select a homestead, the husband...or in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record." Civil Code Section 1262.

"Any person other than the head of a family, in the selection of a homestead, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a 'Declaration of homestead.'" Civil Code Section 1266.

3. Encumbrance of Homestead:

"The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." Civil Code Section 1242.

4. Abandonment of Homestead:

"A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged:

1. By the husband and wife, jointly or by separate instruments, if the claimant is married;
 2. By the claimant, if unmarried."
- Civil Code Section 1243.

5. Marriage Settlements:

These are required to be executed and acknowledged as grants of real property. Civil Code Section 178.

6. Mechanics' Liens:

No acknowledgment is required, but the lien claimant must file a claim of lien which has been verified by oath of the claimant or some other person. Code of Civil Procedure Section 1187.

C. DOCUMENTS WHICH DO NOT REQUIRE ACKNOWLEDGMENT OR PROOF AND CERTIFICATION

Documents which are authorized by specific statutes which do not mention acknowledgment and which do not meet the requirements of an "instrument" as defined in Civil Code Section 1215 do not need to be acknowledged. An example of such a document is a notice of appropriation of water. This notice is required by Civil Code Section 1415 to be recorded, but no acknowledgment is required. Such a notice is not an "instrument" as required by the definition of Civil Code Section 1215.

Government Code Section 27287 lists certain documents which do not need to be acknowledged before recordation. These include the following:

1. Judgments affecting title to or possession of real property properly authenticated.
2. Notices of location of mining claim may be recorded without acknowledgment, certificate of acknowledgment, or further proof.
3. Letters patent from the United States or from the State, executed and authenticated pursuant to existing law.
4. Governmental leases and certain instruments in regard to them.
5. Fictitious mortgages and deeds of trust.
6. Instruments proved by a judgment of a court.
7. Maps.

These are covered by Government Code Sections 27282-6, Civil Code Section 2952, Civil Code Sections 1202-1203, but are made exceptions to the requirement of acknowledgment in Government Code Section 27287.

D. SPECIAL PREREQUISITES IN ADDITION TO ACKNOWLEDGMENT OR PROOF AND CERTIFICATION

The following documents require special prerequisites:

1. Deeds or grants conveying any interest in or easement upon real estate to a political corporation or governmental agency for public purposes shall not be accepted for recordation without the consent of the grantee evidenced by its resolution of acceptance attached to the deed or grant. Under certain circumstances a certified copy of the resolution conferring authority upon the officer or agent must be attached also. Government Code Section 27281.
2. Instruments in a foreign language shall not be recorded unless a translation of English verified and certified under seal of a court of record is attached to the original instrument. Government Code Section 27293.
3. Married women's conveyances formerly required a special form of acknowledgment and examination to avoid duress of the husband. This special requirement has been abrogated, however. Civil Code Section 1186 repealed in 1891.

4. When an instrument is proved by handwriting, the original must be deposited with the recorder to remain for public inspection. Government Code Section 27290.
5. If the grantor received title in a name other than the one by which he conveys title, the conveyance must contain the name by which he obtained title as well as the one by which title is transferred by him. Civil Code Section 1096.

Of course, before any instrument or document may be recorded, the fees must be paid, as required by Government Code Section 27201. This does not apply to instruments to which the United States is a party and which are requested to be recorded by an officer of the United States according to Government Code Section 27202.

From the above discussed material it will be seen that an acknowledgment or proof and certification is generally required as a prerequisite to recordation of nearly all documents. It is, therefore, advisable at this point to summarize briefly the procedure of taking an acknowledgment or proof and certifying the instrument. It is also necessary to discuss the purpose of an acknowledgment and the effect of failure to acknowledge. In a subsequent chapter the effects of recordation of defectively acknowledged instruments will be analyzed in greater detail.(2)

II. DEFINITION AND PURPOSE OF ACKNOWLEDGMENT

An acknowledgment has been defined as a "formal declaration before a duly authorized officer by a person who has executed an instrument that such execution is his act and deed."(3)

The purpose of such an act is to furnish proof of the execution of an instrument. It is essentially intended as a safeguard to prevent forgery of a document.(4) However, in actual practice the acknowledgment and certification has been done in such a summary fashion by a Notary Public that it is not much of a guaranty of anything.(5) It may, however, operate as an estoppel to prevent the acknowledging party from later denying the due execution of the instrument.(6) Its main purpose is to allow a document to be admitted into evidence or to be recorded without any further proof of its execution.(7)

III. EFFECT OF FAILURE TO ACKNOWLEDGE

A. BETWEEN THE PARTIES

Generally, an instrument is valid between the parties thereto regardless of the lack of an acknowledgment. The presence of an acknowledgment is important only in dealing with the rights of third parties.(8) In a few instances an acknowledgment is required for validity of the instrument. These include:

1. Instruments by which a homestead is declared, conveyed or encumbered, or abandoned.(9)
2. Articles of incorporation.(10)
3. Contracts for marriage settlements.(11)

In the case of instruments other than these few, as between the parties, lack of an acknowledgment means that the instrument is not entitled to be recorded or presented in evidence by the parties or a third party, unless proof of execution is made. This proof may consist of a judgment in an action instituted to prove this specific instrument or it may be proper testimony of a subscribing witness or in some specific instances, testimony by a witness to the handwriting. These types of proof are discussed below, showing what formalities must be complied with and what an officer must certify to.

B. AS TO THIRD PARTIES

If a document is recorded without an acknowledgment or with a defective acknowledgment, the party who records will not be protected under Civil Code Sections 1213 and 1214.(12) The instrument will be treated as if it had never been recorded and will be void as against subsequent purchasers and mortgagees who have no actual notice and who record their instruments. This means that a third party who purchases the property involved will not take subject to the interest of the party who recorded the prior instrument since it was improperly acknowledged. He (the subsequent purchaser) is said to have priority even though his interest may have been acquired by an instrument executed subsequently to that of the party to the unacknowledged instrument. In addition, the party who records an unacknowledged instrument is not protected against prior parties who claim under prior unrecorded instruments. Civil Code Section 1214 merely protects parties who properly record their instruments against prior unrecorded instruments.

There are complications, however, when an instrument has been acknowledged by some of the parties but not all. This will be discussed in a later chapter on the effect of recording defectively acknowledged instruments.(13) (See Chapter 2 of Part IV)

From time to time the Legislature has passed Curative Acts giving the effect of constructive notice to recorded instruments although defectively certified.(14) The present statute which has this effect is Civil Code Section 1207:

"Any instrument affecting the title to real property, one year after the same has been copied into the proper book of record, kept in the office of any county recorder, imparts notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate; but nothing herein affects the rights of purchasers or encumbrancers previous to the taking effect of this act..."

This type of statute has reduced the severe results of the recordation of defectively acknowledged instruments. It should be noted that this statute does not protect one who files an incorrectly acknowledged instrument against prior unrecorded instruments. By its terms it is limited to protection against subsequent purchasers after the one year has elapsed.

IV. WHO MAY MAKE AN ACKNOWLEDGMENT

An acknowledgement must be made by the proper party in order for the record to impart constructive notice. In general, the person who executed the document must acknowledge it. It is his act of verification of the instrument.(15) In certain instances, such as an acknowledgment by an attorney in fact,(16) a corporation,(17) or a partnership,(18) other persons are allowed by statute to acknowledge a document. Conveyances of homesteads must be acknowledged by both husband and wife.(19) California has gone through an era in which married women were required to acknowledge instruments in a special way and a different type of examination and certificate were required. The main purpose was to avoid the wife's conveyance under duress of her husband. At the present time, a married woman's conveyance and acknowledgment have no special characteristics.(20)

When an acknowledgment is made by only some of the parties who have executed the instrument, special rules have been developed by the court to determine to what extent the record of such an instrument operates as constructive notice.(21)

V. WHO MAY TAKE AN ACKNOWLEDGMENT

Many cases have arisen in which the acknowledgment has been taken by an individual not authorized by statute.(22) Such documents are not in proper condition to be recorded and if they are actually recorded no constructive notice will be imparted by the record.

Civil Code Sections 1180 through 1184 contain a list of the officers authorized to take acknowledgments. These sections are based on the list in the 1850 statute on Conveyances which has been preserved almost intact with the addition of a few other officers who may take acknowledgments. The Notary Public is the officer who generally performs this task although the number of officers with such authority is an extensive one.

A. OFFICERS WHO MAY TAKE ACKNOWLEDGMENT WITHIN THE STATE:(23)

1. Justice or clerk of Supreme Court.
2. Judge of Superior Court.

(Acknowledgments taken may be in any part of the State of California if taken by either of these parties)

3. Clerk of court of record.

4. County Recorder.
5. County Clerk.
6. Court Commissioner.
7. Notary Public.
8. Clerk of Justice's Court of Class A.
9. Judge of Police or other Inferior Court.(24)

(Acknowledgments by officers enumerated from #3 to #9 must be made in the city, county, city and county, township or district for which the officer was elected, or appointed.)

B. OFFICERS WHO MAY TAKE ACKNOWLEDGMENT OUTSIDE THE STATE OF CALIFORNIA BUT WITHIN THE UNITED STATES:(25)

1. Justice, judge, or clerk of any court of record of the United States.
2. A justice, judge, or clerk of any court of record of any state.
3. A commissioner appointed by the governor of this state for that purpose.
4. Notary Public.
5. Any other officer of the state where the acknowledgment is made authorized by its laws to take such proof or acknowledgment.

When an acknowledgment is taken outside of the state in accord with the laws of the place where the acknowledgment is made, a certificate is required from the clerk of a court of record of county or district where such acknowledgment is taken that the officer certifying to the same is authorized by law so to do, and that the signature of the said officer to such certificate is his true and genuine signature, and that such acknowledgment is taken in accordance with the laws of the place where the same is made.(26)

A similar certificate was formerly required when an acknowledgment made by a Justice of the Peace was to be used in any county other than the one where the Justice resided. This provision was repealed in 1939.(27)

C. OFFICERS WHO MAY TAKE ACKNOWLEDGMENT OUTSIDE THE UNITED STATES:(28)

1. A minister, commissioner, or charge d'affairs of the United States.

2. A consul, vice consul, or consular agent of the United States.
3. A judge of a court of record of the country where the proof or acknowledgment is made.
4. Commissioners appointed for such purposes by the Governor of the State, pursuant to special statutes.
5. A Notary Public.

In 1943, a special provision was added to the code giving certain military personnel authority to notarize documents. This provision is at present in force until the 91st day after final adjournment of the 1951 Regular Session of the Legislature.(29)

D. RIGHT OF DEPUTIES TO TAKE ACKNOWLEDGMENT:

A deputy may under the common law do the acts his principal may perform by virtue of his office.(30) This means that if the principal may acknowledge documents, a deputy may do so also. His right does not necessarily, therefore, depend upon a specific statute covering him. However, Civil Code Section 1184 provides that a deputy appointed by law by any of the persons who may take acknowledgments will have the power to take acknowledgments in the name of his principal. Therefore, both common law and statutory law authorize deputies to acknowledge instruments for their principals provided the principals have that authority.

E. ACKNOWLEDGMENT BY OFFICER WITH PERSONAL INTEREST:

It has been repeatedly held that an officer may not take an acknowledgment if he is personally interested in the transaction.(1) This means that the grantee, mortgagee, or any beneficiary under the instrument is disqualified from taking an acknowledgment. If such officer does take the acknowledgment and the document is recorded, the record will not impart constructive notice to third parties.

Where there are several grantees, an acknowledgment taken by one of them will not completely invalidate the instrument. Such an acknowledgment will affect the rights of subsequent purchasers only. When the instrument is recorded a subsequent purchaser will not be put on notice of the interest of the particular party who made the acknowledgment. He will be put on notice of the interest of the other parties, however.(2)

The question of whether one of several grantors may take the acknowledgment seems to be an open one in California. The cases in which a party has been disqualified all seem to involve an acknowledgment by the grantee.(3)

Agents of the parties are qualified to take the acknowledgment and it seems this is true even if they have an interest in the transaction.(4)

VI. CEREMONY OF ACKNOWLEDGMENT

The Civil Code requires the acknowledging party to appear in person and requires the notary to know or have satisfactory evidence on oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation, or other person who executed it on its behalf. Civil Code Section 1185 covers this situation.

The officer is required to have personal knowledge, which is an acquaintance sufficient to establish identity.(5) If this is not complied with, the officer may be liable in damages for the results of a forgery or fraud, for certifying to the signature without sufficient personal knowledge of the person acknowledging.(6)

The actual ceremony is very simple. It merely consists of an acknowledgment by the party to the instrument that he executed it. The notary accepts this statement and makes out a certificate that such acknowledgment was made.

VII. CERTIFICATE OF ACKNOWLEDGMENT: FORM

The final duty of the notary is to endorse the instrument or attach a certificate of acknowledgment substantially in the form prescribed by the code.(7) The purpose of this certificate is to establish the identity of the grantor and the genuineness of his signature, and of the instrument to which it is attached. It provides a guaranty that the instrument is not a forgery.(8)

Civil Code Section 1189 provides the form of certification which may be used. It is not essential that it be identical, but it must be substantially as provided in the code.

The form suggested in the code is as follows:

"State of..., County of..., ss. On this... day of..., in the year..., before me (here insert name and quality of the officer), personally appeared..., known to me (or proved to me on the oath of...) to be the person whose name is subscribed to the within instrument, and acknowledged that he (she or they) executed the same."

Special forms are provided in the code when the acknowledgment is made by a partnership, corporation, or attorney in fact. Civil Code Sections 1190, 1190a, 1192 contain these forms.

Formerly, a special form was required for acknowledgments of married women, but this requirement has been abrogated. An acknowledgment of a married woman is now taken and certified in the same manner as if she were unmarried. Civil Code Sections 1191, 1186, 1187 cover such matters.

VIII. CERTIFICATE OF ACKNOWLEDGMENT: CONTENTS

The certificate is required to show the following factors:

A. That the acknowledgment was taken within the officer's territorial jurisdiction. Both a statement of the area in which the acknowledgment was taken and a recital of the county in which the officer was appointed or elected must be included. If either is omitted or if there is an ambiguity between the two, the certificate is void and no constructive notice will be imparted from the record of such instrument.

B. The name of the acknowledging party; recital that he is known or proved to the officer by oath of witness (naming the witness) to be the person whose name is subscribed to the instrument acknowledged. If this factor is omitted the record will not constitute constructive notice.

C. The fact of acknowledgment. This estops the acknowledging party from later denying execution of the instrument in most cases. It is a validation of the instrument.

D. Name and quality of officer and seal if he is required to have official seal. If any of these three are missing, the instrument will be valid between the parties, but will not impart notice when recorded.

Civil Code Section 1189 provides a form that may be used which includes these required elements.

IX. OTHER METHODS OF PROVING EXECUTION OF AN INSTRUMENT

First: Proof of the execution of an instrument, when not acknowledged, may be made either:

By the party executing it, or either of them, or
By a subscribing witness. Civil Code Section 1195.

If by a subscribing witness, such witness must be personally known to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness, or must be proved to be such by the oath of a credible witness. Civil Code Section 1196.

The subscribing witness must prove that the person whose name is subscribed to the instrument as a party is the person described in it, and that such person executed it, and that the witness subscribed his name thereto as a witness. Civil Code Section 1197.

Second: Proof may be made by handwriting of the party and a subscribing witness under certain circumstances. For example, when the parties and subscribing witnesses are dead, non-residents of the

state; residence is unknown; subscribing witness conceals himself or cannot be found with due diligence; refusal to testify for a certain length of time. Civil Code Sections 1198, 1199.

When proof is made in either of these two methods it must be certified to by the officer taking it. Proof may be taken by the same officers who may take acknowledgments. See Section V above for discussion of which officers may take acknowledgment or proof.

Third: Any person interested under an instrument entitled to be proved for record, may institute an action in the superior court against the proper parties to obtain a judgment proving such instrument. Civil Code Section 1203.

A certified copy of the judgment in a proceeding instituted under this section entitles such instrument to record, with like effect as if acknowledged. Civil Code Section 1204.

These methods of proof may be substituted for an acknowledgment and if the statutory requirements are complied with, the record of an instrument proved in either of these three ways will impart constructive notice to third parties. The other effects of proper recordation will follow as well.

X. METHOD OF CORRECTION OF CERTIFICATE

If a defectively acknowledged instrument is recorded, a subsequent purchaser will acquire title free of any interest created under that instrument, provided he does not have actual notice of it. To avoid such a result, the legislature has allowed any interested party to bring an action in the superior court to obtain a judgment correcting the certificate.(9) When such a judgment is obtained, a certified copy of it attached to the instrument entitles such instrument to be recorded and it will be treated in the same manner as if acknowledged.(10) This means that a subsequent purchaser taking title after recording of the instrument with the attached copy of the judgment would be put on notice of facts contained therein, and of the legal effect of the instrument.

XI. CONFLICT OF LAWS RULE

When an acknowledgment is made outside the State of California in accordance with the laws of the state in which it was made, the California courts are required to recognize it as a valid acknowledgment. Civil Code Section 1189 states that "any acknowledgment taken without this state in accordance with the laws of the place where the acknowledgment is made, shall be sufficient in this state..." This section further provides that a certificate of the clerk of a court of record of the county or district where such acknowledgment is taken that the officer is authorized to take acknowledgments and that his signature is true and genuine, and that the

acknowledgment is taken in accordance with the laws of the place where it is made, shall be prima facie evidence of the facts stated in the certificate of said clerk. This certificate will be of importance in offering the instrument acknowledged outside the state for record or in evidence. If, however, the acknowledgment would be good under California laws and the officer is authorized by our statutes to take acknowledgments outside the state, this certificate from the clerk of the other state is not required.(11)

XII. RETROACTIVE EFFECT OF STATUTES

The validity of an acknowledgment is dependent upon the laws in effect at the time when the acknowledgment is made. No retroactive effect is given to the statutes providing for the manner of acknowledgment, proof and certification.(12) If the instrument was acknowledged in accordance with the laws in existence at the time the ceremony was performed, it has the same force in evidence, and may be recorded in the same manner and with the like effect, as conveyances executed and acknowledged in accordance with the present statutes.(13)

XIII. CONCLUSION

This chapter has emphasized the requirements of a valid acknowledgment and the purpose and effect of it. It has pointed out the effect of a defective acknowledgment and the possibility of curing such defect. It has considered substitute methods of proof of instruments and when they are available. In a subsequent chapter, cases involving the effect of recording defectively acknowledged instruments will be discussed.

FOOTNOTES TO CHAPTER 5: PREREQUISITES TO RECORDING

1. De Wolfskill v Smith, 5 Cal App 174.
2. See Chapter 7.
3. De Wolfskill v Smith, cited supra, footnote #1.
4. Gordon v City of San Diego, 108 Cal 264; Fogarty v Finlay, 10 Cal 239.
5. Gage, D. D., Land Title Assuring Agencies (1937), p. 28.
6. Bryan v Ramirez, 8 Cal 461.
7. Fogarty v Finlay, cited supra, footnote #4.
8. Middlecoff v Hemstreet, 135 Cal 173; Landers v Bolton, 26 Cal 393.
9. Civil Code Sections 1262, 1266.
10. Corporations Code Section 307.
11. Civil Code Sections 178, 179.
12. Hale v Pendergrast, 42 Cal App 104; Kelsey v Dunlap, 7 Cal 160; Wolf v Fogarty, 6 Cal 224.
13. See Chapter 7.
14. For citations of various curative statutes see Chapter 1.
15. Civil Code Section 1185.
16. Civil Code Section 1192.
17. Civil Code Sections 1185, 1190.
18. Civil Code Section 1190a.
19. Civil Code Section 1242.
20. See 1 Cal Jur Acknowledgments Section 34, p. 270 for a discussion of the original provisions for married women's conveyances.
21. See Chapter 7.
22. See for example McMinn v O'Connor, 27 Cal 238, in which an acknowledgment was taken by a Consular Agent. Under the statute applicable at the time of this case a Consular Agent was not authorized to take acknowledgments.

23. Civil Code Sections 1180, 1181.
 24. Code of Civil Procedure Section 179
 25. Civil Code Section 1182.
 26. Civil Code Section 1189.
 27. Civil Code Section 1194.
 28. Civil Code Section 1183
 29. Civil Code Section 1183.5, added by Stats. 1943, c. 28, Section 2.
 30. Muller v Boggs, 25 Cal 175.
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1. Chapman v Hicks, 41 Cal App 158; Lee v Murphy, 119 Cal 364; Murray v Tulare Irr. Co., 120 Cal 311; Ramsey v California Packing Corp., 51 Cal App 517.
 2. Murray v Tulare Irr. Co., cited supra, footnote #1.
 3. 1 Cal Jur Acknowledgments Section 14, p. 244.
 4. Bank of Woodland v Oberhaus, 125 Cal 320; First National Bank v Merrill, 167 Cal 392 in which stockholder of grantee corporation took acknowledgment. Court held it was proper in spite of pecuniary interest stockholder naturally had.
 5. Kelsey v Dunlap, cited supra, footnote #12.
 6. Political Code Section 801; Government Code Section 8214.
 7. Civil Code Section 1188.
 8. Wedel v Herman, 59 Cal 507.
 9. Civil Code Section 1202.
 10. Civil Code Section 1204.
 11. Holland v Hotchkiss, 162 Cal 366.
 12. Civil Code Section 1205.
 13. Civil Code Section 1206.

Chapter 6: EFFECT OF RECORDING - IN GENERAL
(By University of Southern California)

I. INTRODUCTION

The common law had no such requirement as recording. The instrument which was first executed was given priority over any instruments subsequently executed. When recording was permitted in England by the Statute of Anne, it was merely for the purpose of maintaining the common law priority which the first purchasers already had. If a purchaser were first in time of execution and recorded his instrument before a subsequent purchaser recorded his instrument, he was said to have preserved the priority which the common law had given him. Under this statute there was no provision for constructive notice. In most situations this made no difference. In one situation, however, it did make a difference. According to the common law if a prior purchaser acquired merely the equitable title and a subsequent purchaser obtained the legal title in good faith, for value and without notice of the prior purchaser's equity, the subsequent purchaser would take the legal title free of the claim of the prior equity. This is the only instance in which the common law departed from the rule of "first in time is first in right." In this situation notice was important. The English courts held that recording the instrument under which the prior purchaser acquired his equitable title would not give notice to the subsequent purchaser of the legal title. He would still receive title free of the claim of the prior equitable owner if he had no actual notice, acted in good faith, paid value and recorded first. The statutes in the United States, including the California statute, provide that the record constitutes constructive notice to any subsequent purchaser. Therefore, in a case like the one just discussed, the subsequent purchaser of the legal title would have notice from the record of the equitable interest in the prior purchaser and would not be able to claim that he was a bona fide purchaser. Civil Code Section 1213 provides for this doctrine of constructive notice. This doctrine should not be relied on in cases where it is sufficient to state that the prior purchaser by recording has preserved his common law priority. The courts rely on the doctrine of constructive notice heavily, however, and decide most cases on the basis of whether a subsequent purchaser had notice from the record or not which would affect his standing as a bona fide purchaser without notice.

These matters are discussed in more detail and authority cited in the Introductory Chapter.

II. EFFECTS OF RECORDING UNDER THE CALIFORNIA RECORDING STATUTE

As has been discussed before, an "instrument" must first be authorized and must comply with the prerequisites to recording before it may be recorded. The recording must then be completed in proper fashion. That is, the instrument must be properly filed with the proper officer in the proper county, and properly transcribed and indexed. When these matters have all been completed the results will be as follows:

(1) A prior purchaser who records first will have priority over subsequent purchasers who record later, since by recording he has preserved his common law priority.

(2) He will also have priority over a prior purchaser who has failed to record or who records later, according to the provisions of Civil Code Section 1214.

(3) The record of his instrument will operate as constructive notice to subsequent purchasers to prevent them from claiming as bona fide purchasers without notice. This doctrine is relied on by the courts frequently in protecting prior purchasers against subsequent purchasers. For example, the courts have reiterated the statement that the purpose of the recording statutes is to protect the true owner of the legal title against the claims of subsequent purchasers, by conclusively imputing to such purchasers notice of all previously recorded conveyances.(1) Civil Code Section 1213 provides for this notice as follows: "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees;..."

Since this statute is in derogation of the common law, it must be strictly construed.(2)

It is important to inquire as to when the notice begins to affect subsequent purchasers. Civil Code Section 1170 states: "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record." Civil Code Section 1213 requires proper recording before notice begins to affect subsequent purchasers.

If an error has occurred in the recording process so that a purchaser could not find the document that has been recorded or if the document is never actually copied into the record books, no constructive notice will follow. An exception is made when the instrument is copied into the wrong book, but indexed in the proper book and in the proper manner. In that case, Government Code Section 27327 provides that the instrument will impart notice of its contents to all persons from the date of such indexing. Errors are discussed in Chapter 8.

It should also be noted at this point that the record only gives notice to certain persons. These persons include subsequent bona fide purchasers and mortgagees. It is not notice to subsequent creditors. It is not notice to prior purchasers and mortgagees. However, if a prior purchaser or mortgagee fails to record before a subsequent bona fide purchaser or mortgagee records, the prior purchaser will not be protected against the subsequent purchaser who records first and meets the requirements of Civil Code Section 1214. This result is because of the terms of Civil Code Section 1214 and not because of the doctrine of constructive notice.

Finally, there is the problem of what matters the record will give notice of. Civil Code Section 1213 states that the "record is constructive notice of the contents thereof..." This has been expanded by the cases to include some other matters which arise by reason of recitals in the recorded instrument or by inference from statements in the record. This problem is discussed in detail in Chapter 10, "Matters of Which Record Imparts Notice."

(4) An authorized instrument which has been properly recorded may be read in evidence without further proof. Section 1951 of the Code of Civil Procedure provides:

"Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof."

III. EFFECT OF FAILURE TO RECORD UNDER THE CALIFORNIA RECORDING STATUTE

Civil Code Section 1211 provides that an instrument which is not recorded will be void as against subsequent bona fide purchasers or mortgagees who record first. Chapter 11, "Effect of Failure to Record," discusses the question of who may assert the invalidity of an instrument which has not been recorded properly. It discusses the problems of purchaser for value, in good faith, and without notice.

This chapter is limited to recording of "instruments" which constitute "conveyances" as defined by Civil Code Section 1215. Other documents, such as writs of attachment, *lis pendens*, *et cetera* may be recorded under various statutes. Those statutes or cases interpreting them determine the effect of recording the specific documents involved. These matters were discussed in detail in Chapter 2, "Instruments Which are Authorized to be Recorded".

FOOTNOTES to CHAPTER 6: EFFECT OF RECORDING - IN GENERAL

1. Anderson v. Willson, 46 Cal App 289; Central Const. Co. v. Hartman, 7 Cal App (2) 703; Hager v. Spect, 52 Cal 577.
2. Chamberlain v. Bell, 7 Cal 292.

Chapter 7: EFFECT OF RECORDING UNAUTHORIZED, VOID, OR DEFECTIVELY
ACKNOWLEDGED INSTRUMENTS
(By University of Southern California)

I. INTRODUCTION

Generally, when an instrument which is authorized by the general recording statute and complies with the prerequisites to recording, is properly recorded, several beneficial results follow. These were discussed in Chapter 6, but will be enumerated here.

(1) Recording of an instrument which has been executed first in time results in the maintenance of the grantee's common law priority. He will be protected against purchasers who later obtain interests in the same property and record their instruments even if they meet the requirements of bona fide purchasers.

For example, A purchases Blackacre from B by a deed which is properly acknowledged and certified, and which B records. Subsequently, A attempts to convey the same property to C, a bona fide purchaser, who records his deed subsequently to the recording by B of his deed.

At common law, B would have priority since he is first in time and is protected against subsequent purchasers.

According to the California view, recording by B prior to C's recording maintains the common law priority which B already had. This priority may be lost, however, by failure to record before a subsequent bona fide purchaser records under the terms of Civil Code Section 1214.

(2) By recording, B has in fact put subsequent purchasers on notice of his interest from the record. In most cases, it is not necessary to discuss constructive notice from the record, since the common law rule of first in time will apply, provided the first purchaser records first.

There is, however, one situation in which it is necessary to discuss constructive notice. That is when a party is protected by the recording statute who would not have been protected at common law.

The most familiar example of this is the purchase by A of the equitable title and the subsequent purchase by C of the legal title in good faith and for value, without notice of the prior sale of the equitable title. At common law, the purchaser of the equitable title, although first in time is not protected as against a subsequent bona fide purchaser of the legal title. Under the California recording statute, Civil Code Section 1213, the subsequent purchaser, B, is said to have constructive notice of the purchase of the equitable title by A, provided A has recorded his instrument properly before B records.

In this situation it is proper to discuss constructive notice. In any other situation in which a prior party who purchases the legal title records first he is merely maintaining his common law priority. He is not

giving constructive notice to subsequent purchasers as his main purpose of recording. However, as will be seen from cases discussed in this chapter, the courts use the doctrine of constructive notice in almost all cases, when it would have been sufficient to say the first purchaser prevails because he retained his common law priority by recording rather than by saying the subsequent purchaser was put on constructive notice from the record of the first instrument. In practical effect there is no difference which line of reasoning is followed, but technically, the courts relying on the doctrine of constructive notice in such a situation have failed to analyze the situation completely.

The doctrine of constructive notice is important in determining whether a subsequent purchaser is bona fide and meets the requirements of a bona fide purchaser. This is a proper use of the doctrine aside from the priority question. Matters which he learns from the record such as recitals, information leading to the discovery of other documents, and other data, affect the purchaser's standing as a "bfp." This in turn, of course, affects his right to protection under Civil Code Section 1214 against prior unrecorded instruments. In this sense, therefore, it is proper to discuss constructive notice in certain instances. However, the courts have a tendency to rely too heavily on this doctrine and ignore the rule of recording for the purpose of maintaining common law priority. The question of notice as it affects the status of a bona fide purchaser is discussed in Chapter 11.

(3) The recording statute makes another radical change in the common law rules of priority. At common law only a prior purchaser had priority. Under Civil Code Section 1214 a subsequent purchaser who records before a prior purchaser does is protected against that prior purchaser, provided the subsequent purchaser meets the requirements of that statute of good faith, payment of value, and no notice.

For example, A conveys to B who does not record. A then conveys to C, a bona fide purchaser, who records before B records. Civil Code Section 1214 states that the conveyance to B is void as to C, provided he meets the statutory requirements and records properly.

In conclusion, it will be seen that a purchaser who records his instrument is entitled to protection against subsequent purchasers according to one of two theories and he is also protected against prior parties who failed to record.

These results only apply in the following situation. The instrument which is recorded must be a valid instrument, must be authorized by the general recording statute, and must be properly acknowledged, certified and recorded.

If the instrument is not recorded, or fails to meet the prerequisites required by the code, or is not authorized, these results do not follow. The result in such cases is that the instrument is generally void as to subsequent purchasers and is not protected against prior unrecorded instruments.

There are some instances in which this does not necessarily result. For example, an instrument may be authorized by some specific statute other than the general statute and have some of the effects of recording. For discussion of this, see Chapter 2. Also, an instrument may be acknowledged by only some of the parties who executed it, which makes it defective, but some results of recording will follow. This is discussed below.

The purpose of this chapter will be to point out the results of recording instruments which do not comply with the requirements of the type of instrument which the code contemplates in the recording statute. This may be because the instrument is not authorized, is void, or defectively acknowledged, or defective in some other manner. These problems will be discussed under the following headings:

- (1) Effect of Recording Unauthorized Instruments
- (2) Effect of Recording Unacknowledged or Defectively Acknowledged Instruments
 - (a) Unacknowledged Instruments
 - (b) Defectively Acknowledged Instruments
 - (c) Instruments Acknowledged by GRANTEE only
 - (d) Instruments Acknowledged by GRANTOR only
 - (e) Instruments Acknowledged by Some of the Grantors
- (3) Effect of Recording Void Instruments
- (4) Effect of Recording Instruments Not Under Seal
- (5) Effect of Recording Instruments Containing Errors (See Chapter 8)

II. EFFECT OF RECORDING UNAUTHORIZED INSTRUMENTS

The question of what instruments are authorized by the codes and statutes to be recorded has been considered in Chapter 2. This section will deal with instruments which are clearly not authorized to be recorded.

When an instrument not authorized by the general recording statute is recorded, it is treated as if it had never been recorded. Neither Civil Code Section 1213 nor 1214 will apply to protect the grantee. This means that such a grantee will not be protected against subsequent bona fide purchasers who record properly. He will not be protected against a prior purchaser who failed to record instruments. The court generally states that the record of an unauthorized instrument will not give constructive notice to subsequent purchasers to prevent their qualifying as bona fide purchasers without notice under Civil Code Section 1214.

The instrument may possibly be authorized by some specific statute other than the general recording statute. In that case, the effects of recording will be determined by the particular statute involved. For a discussion of these various statutes and the effect of recording instruments under them, see Chapter 2.

When a void instrument is recorded it is not given any validity whatsoever. This problem was discussed in the cases of People v Harrold(1) and People v O'Brien.(2) Both of these cases involved the recording of instruments which had been forged.

Early cases decided under the 1850 statute declared that an executory contract to purchase was not entitled to be recorded. Present decisions permit recording of such an instrument, on the theory that it involves a conveyance of an equitable interest in land and, therefore, is authorized by the general recording statute, Government Code Section 27322. The early cases held that since this instrument was not entitled to record, no constructive notice would follow from the recordation of such an instrument. In addition, the vendee would not be protected against prior purchasers who failed to record their instruments. The contract was treated as if never recorded.

The modern view is that such contract may be recorded and when recorded the results of recordation will follow.(3) When the prior instrument is one conveying an equitable interest and the subsequent instrument conveys the legal title, it is necessary to rely on the doctrine of constructive notice to protect the prior party. The common law would protect only the purchaser of the legal title in such a situation. When, however, there are two successive purchasers of the equitable title (vendees under a contract of sale) the first in time will be protected if he records first. There is no necessity of discussing constructive notice in such a case although the courts do consistently. The courts generally have a tendency to say that the second purchaser has constructive notice from the record of the first instrument and, therefore, he takes subject thereto. It is better to rely on the rule that recording in such a situation results in the retention of the common law priority which the first vendee already has.

Since this is the result of recording an unauthorized instrument, the courts have been liberal in deciding that most instruments should be considered authorized.(4)

Of course, it must be noted that if the instrument of record is actually seen by the subsequent purchaser, he will be held to have notice regardless of whether it was a type authorized or not.(5) The reason for such a rule is obviously to prevent the law from protecting subsequent purchasers who do not require such protection and indeed do not deserve it. The same result is reached when the purchaser has notice of such facts and circumstances that would put a reasonable man on inquiry as to the existence of such a document. This reasoning runs through the entire law on recordation and constructive notice and is based on a sound public policy.

III. EFFECT OF RECORDING DEFECTIVELY ACKNOWLEDGED INSTRUMENTS

In Chapter 5 the prerequisites to recordation enumerated by the code were discussed in detail. The purpose of the present discussion is to analyze those cases in which the prerequisites have not been complied with

and to determine the effect of recording these defectively acknowledged instruments.

Before discussing this effect, it is necessary to consider the question of whether such instruments are proper to be recorded. That is, will the Recorder be required to accept such documents for recordation? If they are accepted for record, the next problem to be considered is what the result will be of recording. That is, what effect it will have as to various parties.

The courts have consistently stated that no matter how large or small the defect, an instrument with a defective acknowledgment is not entitled to be recorded. This is true of the cases interpreting the present code sections and the 1850 statute.(6) The basis for this is that the formalities are a necessary part of the conveyance, without which an instrument cannot be admitted to record. Since the recording act is in derogation of the common law, the courts are very strict in their interpretation and all statutory prerequisites must be complied with.(7)

Examples of errors made in the acknowledgment include:

- (1) Lack of an acknowledgment.
- (2) Failure to show in the certificate that the person acknowledging the instrument was personally known to the officer.
- (3) Acknowledgment taken by one with a pecuniary interest in the transaction.
- (4) Acknowledgment taken by one not authorized by statute to take acknowledgments.
- (5) Venue and jurisdiction omitted; no showing that the officer was within his area when he took the acknowledgment.

In all of these situations, the instrument is not proper and should not be admitted to record.

In certain instances, however, an acknowledgment is not a statutory prerequisite, and of course, in such a case the instrument may be recorded without such formality. An illustration of this is a sheriff's duplicate certificate of sale, which may be recorded without acknowledgment, proof, or certification.(8)

A situation in which the courts have compromised is in the recording of an instrument acknowledged by some but not all of the executing parties. It is entitled to record,(9) but it may not have the beneficial results of recordation. The question of what results will follow is a troublesome problem and the courts have arrived at different results depending on which individuals have acknowledged the instrument.

The effect of recording defectively acknowledged instruments is generally the same as if the instruments had never been recorded.

(1) The purchaser who is first in time by recording a defectively acknowledged instrument fails to maintain his common law priority. He will not have priority over a subsequent purchaser who records first, having met the statutory requirements of bona fide purchase. Such an instrument is treated as unrecorded and under Civil Code Section 1214 will be void against subsequent parties who record properly.

(2) The record of such an instrument fails to operate as constructive notice to subsequent purchasers under Civil Code Section 1213.(10) This means that a subsequent purchaser can claim to be bona fide and without notice from the record. He will then prevail over the prior purchaser provided he has no notice from other facts and circumstances. The record will not affect his status as a bona fide purchaser without notice.

(3) The purchaser who records a defectively acknowledged instrument will not be protected under Civil Code Section 1214 as against prior purchasers who have failed to record their instruments. The common law rule of first in time will generally prevail as between the purchaser of an instrument defectively acknowledged and recorded and a prior unrecorded instrument. It is the same as if both instruments were unrecorded.

(4) The parties may assert the validity of the instrument.(11) Lack of an acknowledgment will only affect the validity as to third parties. A few instruments, however, must be acknowledged in order to have any validity at all. An example of this is a declaration of homestead, which must be acknowledged for validity.

(5) Although a defectively acknowledged instrument is void as to certain subsequent parties it will be valid as against subsequent purchasers with notice, either actual or constructive.

When a subsequent purchaser has actual notice of an instrument which is defectively acknowledged or not acknowledged, he will take subject to the interests created thereby. This is to prevent frauds.(12)

Constructive notice from facts and circumstances is still a part of the California law to a certain extent.(13) Therefore, if a purchaser has knowledge of certain facts which would put a reasonable man on inquiry as to the effect of an instrument, whether acknowledged or not, he will be charged with notice of the facts he would have garnered from a reasonable investigation. The problems of notice other than that derived from the record are discussed subsequently in Chapter 11, and in Chapter 2 of Part IV. They present a very serious situation and lend an element of uncertainty to every conveyance. A purchaser can theoretically search the record, but it is very difficult for him to go beyond the record and decide what he should search and what he should know to be sure he is acquiring a clear title.

An illustration of the application of the rule of actual notice is contained in the case of Hammond Lumber Co. v Roubian. (14) The Hammond case involved a claim of mechanics' lien made by a mechanic who had actual notice of a prior trust deed on the property which had not been properly acknowledged but had been recorded. The court held the trust deed had priority over the mechanics' lien in spite of the defective acknowledgment, since the lien claimant had actual notice of the prior trust deed.

Henrici v South Feather Land Etc. Co. (15) involved constructive notice from facts outside the record. An agreement had been made between the original grantor and grantee of certain land in which the grantor agreed to supply the grantee with water from the land which he retained. The water was to be supplied for the use of the grantee on his land which he had purchased from the grantor. The court held this constituted an easement on the grantor's land in favor of the grantee's land. A subsequent purchaser of the grantor's retained land which was subject to this easement (the servient estate) claimed that he should not be charged with notice of the easement since the agreement was not properly acknowledged before recordation. The court held that from an inspection of the area, the easement could be determined by a reasonable man and an inquiry as to its validity should have been made. If such an inquiry was not made, the subsequent purchaser would still be charged with notice of whatever he would have discovered by a reasonable investigation. The court held, therefore, that this purchaser had failed to carry out his duty of investigating and, therefore, that he would take subject to this easement regardless of any defective acknowledgment. The court relied on Civil Code Section 19 which states: "EVERY person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

The courts have from time to time criticized this doctrine of actual notice and constructive notice from facts and circumstances since it violates the policy of the recording act which theoretically provides persons are to be put on notice only of matters which are of record. However, it is the law and has been enunciated over and over again by the courts.

When a homestead is involved, the court has refused to apply the doctrine of actual notice or constructive notice from facts and circumstances. In Lee v Murphy (16), the court has refused to apply the doctrine of actual notice or constructive notice from facts and circumstances. In Lee v Murphy (16), a defectively acknowledged mortgage was recorded prior to a homestead. The claimant of a homestead had actual notice of the prior mortgage, but was still upheld by the court when the mortgagee sued to foreclose the mortgage against the homestead claimant. This is at first glance a peculiar case, but the court came to this conclusion by a strict interpretation of the statute involving homesteads. Civil Code Section 1241 states "The homestead is subject to execution or forced sale in satisfaction of judgments obtained:....(4) On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." The court held that this mortgage was not properly

recorded before the declaration of homestead was filed due to the defective acknowledgment. The court treated the recordation as null and void and, therefore, no notice from the record would be possible. The court confirmed, however, and stated that the code section does not specifically provide for a sale of the homestead when the homestead claimant has actual notice, but only when there has been a proper recordation of the former instrument. An extremely strict interpretation of the code section is effected, but of course, it is true that the sympathies are with the party who homesteaded the property. Perhaps the court has done the proper thing under the facts of the case, but such a precedent does open the door to fraud on the part of persons with actual notice. It is certainly a different interpretation than that which is generally given when interests other than homesteads are involved. This is the result of the specific language, however, contained in the homestead statute. Other instruments would come under Civil Code Section 1217 which states "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." An instrument which is defectively acknowledged is treated as if unrecorded for the purposes of this code section.

There are a few situations in which the results enumerated above will not follow, so it will be necessary to go into more detail as to the effects of recording various types of defectively acknowledged instruments. The discussion will be included under the following headings:

- A. Effect of Recording Unacknowledged Instruments.
- B. Effect of Recording Defectively Acknowledged Instruments.
- C. Effect of Recording Instruments Acknowledged by the Grantee only.
- D. Effect of Recording Instruments Acknowledged by the Grantor only.
- E. Effect of Recording Instruments Acknowledged by some of the Grantors.

A. EFFECT OF RECORDING UNACKNOWLEDGED INSTRUMENTS

When unacknowledged instruments are recorded, the results are as discussed above. No constructive notice is given by the record, and the instrument is treated as void as to subsequent purchasers who are bona fide and without notice and pay value and record. No protection is given against prior unrecorded instruments.

B. EFFECT OF RECORDING DEFECTIVELY ACKNOWLEDGED INSTRUMENTS

The defects may consist of failure to show the person acknowledging the instrument was known to the officer taking the acknowledgment, failure to show the proper venue, and many other irregularities in the certificate or the ceremony of acknowledgment. The effects of recording such

instruments are as discussed above. There is no protection against prior persons who failed to record and no notice to subsequent purchasers from the record.

C. EFFECT OF RECORDING INSTRUMENTS ACKNOWLEDGED BY THE GRANTEE ONLY

Government Code Section 27288 states that the party to acknowledge is the "party who appears by the instrument to be the party whose real property is affected or alienated thereby." This means that the grantee's acknowledgment is generally worthless and superfluous.(17) However, if the grantee has covenanted to do certain acts or refrain from doing certain acts on his land it would seem that his acknowledgment would then be essential since his real property would be affected by the instrument. Otherwise, his interest in the real property would not be affected, only that of the grantor. The custom seems to be to record instruments containing the acknowledgment of the vendee only, but the courts have held they do not give constructive notice to subsequent parties. It would seem that a different result would follow if the vendee had actually made covenants affecting his land.

D. EFFECT OF RECORDATION OF INSTRUMENTS ACKNOWLEDGED BY THE GRANTOR ONLY

The grantor is generally the only person who is transferring any interest in land or creating any encumbrance thereon. The policy is that the acknowledgment of the parties who actually are creating an interest in real property should be included, but not that of other persons, even if they are parties to the instrument. Therefore, when a document acknowledged by the vendor alone is recorded (when he is the only one affecting interests in property), it is perfectly proper.

The results of recording will be that the party who records will be protected against subsequent bona fide purchasers who record later and against prior parties who have failed to record. The record of such an instrument imparts constructive notice of its contents to subsequent purchasers.(18)

E. EFFECT OF RECORDING INSTRUMENTS ACKNOWLEDGED BY SOME OF THE GRANTORS

It has been shown that acknowledgment by all of the parties to an instrument is not required to admit the instrument to record. It has also been shown that acknowledgment by the vendor alone will be sufficient and the record will impart constructive notice and the vendee will be protected against prior parties who failed to record. When the vendee alone acknowledges the instrument, it may be recorded, but the benefits of recording generally do not flow.

The problem presented in this section is twofold. First, to whom will an instrument acknowledged by one vendor when there are several vendors impart notice when recorded? Second, to what extent will such instrument impart notice when it is recorded? That is, will it be notice of the entire

instrument and all rights created thereunder, or only notice of the interests created by the vendor who acknowledged?

These problems were both discussed in Bell v Sage(19) which involved foreclosure of a chattel mortgage acknowledged by one of two parties to the mortgage. The case was fairly simple to decide, however, since the court found that although two parties had executed the mortgage, only one had title to the chattel and, therefore, that party's acknowledgment was necessary. Since that party had not acknowledged, the instrument though recorded with the other party's acknowledgment, did not constitute notice to anyone. This is based on the requirement that the party who creates the interest in property by his conveyance must acknowledge the instrument.

The court in Bell v Sage, however, gave a thorough analysis of the problem and discussed the situation as if co-owners had been involved and only one had acknowledged. The first question discussed was to whom such an instrument would be constructive notice. The court, relying on Spect v Gregg(20) and Fresno Canal Etc. Co. v Rowell(21), stated "it has been held that the record of an instrument acknowledged by only one of the persons executing it is constructive notice to subsequent purchasers from the one so acknowledging." The cases relied on by the court really do not constitute strong authority for this proposition. The first case, Spect v Gregg, involved a power of attorney to convey land executed by several persons, but acknowledged by only one. The only question decided in this case was that a certified copy of such power should be admissible in evidence. It really stands for the proposition that such an instrument was properly recorded, even though acknowledged by only one party. The case does not discuss constructive notice. The second case, Fresno v Rowell, involved an instrument acknowledged by the vendor but not by the vendee. This it has been seen is sufficient to allow the instrument to be recorded and to give constructive notice. It is a situation where the only party who is affecting an interest in real property has acknowledged. That is different from the situation involved where one of the vendors acknowledges, but not the others, since there are several persons who are conveying or encumbering land, who have not acknowledged the instrument.

This conclusion that the record would be constructive notice to persons taking title from the party who acknowledged, but not as to other persons was followed by the Supreme Court in DuRoss v Trainor(22). The court refers to Bell v Sage, which stated "the court likewise held that an effective execution or attestation by one grantor could not supply the lack of execution or attestation by another grantor, but the grantees of a grantor who had not acknowledged the instrument or whose signature had not been properly proved was not bound by the contents of the instrument." The court in the DuRoss case states that a hearing had been denied by the Supreme Court in the case of Bell v Sage and that the court is in accord with everything that was said in that case.

The second question discussed by the court in Bell v Sage was: To what extent would the instrument be notice to subsequent purchasers? That

is, would they be put on notice of the interests acquired by all persons under the instrument, or only the interests acquired from the grantor who acknowledged the instrument?

The court reviews the authorities and concludes that "where there are several grantors the acknowledgment of one of them is effective only as to his own grant and not as to those of the other grantors, in the absence of special statutory provision, and the record thereof is constructive notice only of the conveyance of the one who made the acknowledgment." (23)

This language is quoted by the Supreme Court in DuRoss v Trainor and is approved very emphatically.

The problems presented by these cases can be illustrated as follows:

- (1) X and Y are co-owners and convey by deed their property to A. The deed is acknowledged by X only and then recorded. Between the parties, A has acquired a good title to the entire property.
- (2) X later conveys to B his interest in the property. B is charged with constructive notice of the former deed by X and Y to A since he is dealing with the party who had acknowledged in the first place. Therefore, B takes nothing.
- (3) Later Y conveys to C his interest in the property. Since Y had not acknowledged the deed to A the record of the deed does not give constructive notice to C. C then has priority over A as to half of the property and becomes a co-owner with A of the property.
- (4) If X and Y subsequently join in a conveyance to K after the original conveyance to A, the result would apparently be as follows: K will be put on notice as to one-half of the property, since he is dealing with X, the party who acknowledged the original instrument to A. He will, however, take title to the one-half transferred by Y since he is not on notice of any former conveyance by Y who had failed to record. K would then be a co-tenant with A.

Before leaving the subject of defectively acknowledged instruments, it is advisable to refer only briefly to the Curative Acts which have been passed by the legislature from time to time giving the effect of constructive notice to the record of defectively acknowledged instruments after they have been of record for a certain length of time. (24) The present statute, Civil Code Section 1207, provides for constructive notice after the instrument has been of record for one year.

IV. EFFECT OF RECORDING VOID INSTRUMENTS

A void deed is unenforceable and receives no validity from the fact of recording. The courts have from time to time discussed the problem of constructive notice in connection with void deeds. For example, in Vassault v

Austin(25) the court stated "we know of no principle justifying us in holding that the record of a deed, void as to any person, was notice to such person of anything, except, perhaps of the existence of the void instrument." The case of Haight v Vallet(26), disapproved of this language and stated that a recorded void deed is not notice of anything, not even of its existence. It should be noted that when a void deed is involved there is generally no question of constructive notice and, therefore, no need to discuss it. The problem which usually results is whether a purchaser can prove good title when one of the instruments in his chain of title was void because forged or some other reason. The courts have held in such a situation that a void deed remains void and no one can claim rights through or under it. No vitality is given by recording. There has in effect been a break in the chain of title. This problem is discussed more completely in Chapter 2 of Part IV involving defects in the recording system.

V. EFFECT OF RECORDING INSTRUMENTS NOT UNDER SEAL

Historically, seals were required on certain instruments conveying interests in real property. Omission of such seal meant that the document was not entitled to be recorded. If recorded, the record would fail as constructive notice to third parties, and none of the other benefits of recordation would follow. This is in accord with the policy of the court to require all prerequisites to recordation to be complied with in order to obtain protection from the recording statute. It is an example of the strict interpretation of the recording acts, due to the fact that they are in derogation of the common law, which did not require recording in any instance.

Civil Code Section 1629 provides: "All distinctions between sealed and unsealed instruments are abolished." The result is that now either type of instrument may be recorded and is treated in the same manner. The normal results of recordation will follow. The few cases decided under the 1850 statute which required the seals remind us of the severity of this requirement which is merely of historical interest at the present time.(27)

VI. EFFECT OF RECORDING MARRIED WOMEN'S CONVEYANCES

At the present time, married women are treated in the same manner as if unmarried when they convey property. Civil Code Section 1187 has codified this as follows: "A conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner." This has not always been true as can be seen from a reading of the 1850 statute on Conveyances. A special form of acknowledgment was required, without which a married woman's conveyance was invalid. In addition, a privy examination was required to be held by the notary not in the presence or hearing of the woman's husband. The purpose of this was to avoid pressure or influence exerted on the wife by her spouse. The certificate of acknowledgment had to state that such an examination had been given. The examination consisted of questions involving the wife's desire to transfer this property and required a statement by her that she was doing this of her own free will and not as a result of any influence of her husband.

Many of the cases involving defective acknowledgments are those involving conveyances by married women before 1891 when this requirement was abolished. These cases all held that if the formalities were not complied with, the conveyance was void and not entitled to record. If it were recorded, none of the benefits of recordation would follow. No protection would be given against either prior or subsequent purchasers under the recording statute.

VII. CONCLUSION

This chapter has stressed the rule that instruments which are unauthorized either because not of the type contemplated by the code, or because the statutory requirements have not been complied with, are not proper instruments to record. If, however, they are accepted for recordation, a subsequent purchaser will not be subject to the interests created under these instruments. Such a purchaser will not be held to have notice of the contents of these instruments or of inferences that could be gathered from the contents. Of course, if the purchaser has actual notice or constructive notice from possession or facts and circumstances outside the record, he will be required to investigate or be held to have notice of what he would have learned from the investigation. As has been seen in this chapter, this is a burden on the purchaser, since he does not know where to look for this information, and is in violation of the principle of the recording act which is merely to put parties on notice of what appears of record with the exception of matters of which they have actual notice. In addition, the party who records an unauthorized instrument is not protected against prior unrecorded instruments regardless of the good faith with which he received his conveyance, since he has not properly recorded an authorized instrument prior to the recordation of a former instrument as required by Civil Code Section 1214.

This chapter has distinguished the problem of recordation of a void instrument. Such an instrument is invalid and recording does not render it valid. No one can claim any rights through or under it.

FOOTNOTES to CHAPTER 7: EFFECT OF RECORDING UNAUTHORIZED, VOID, OR DEFECTIVELY ACKNOWLEDGED INSTRUMENTS

1. 84 Cal 567.
2. 96 Cal 171.
3. See discussion of this problem in Chapter 2.
4. Hale v Pendergrast, 42 Cal App 104: Supreme Court refused to hold notice of right to repurchase was an unauthorized instrument. Appellate Court had held it was unauthorized and Supreme Court refused to approve this part of the decision.
5. Parkside Realty Co. v MacDonald, 166 Cal 426.
6. Bell v Sage, 60 Cal App 119; Hale v Pendergrast, 42 Cal App 104, cited supra, footnote #4; Wolf v Fogarty, 6 Cal 224; Mayhew v Melby, 206 Cal 396; Henrici v South Feather Land Co., 177 Cal 442; Wallace v Moody, 26 Cal 387; McKinn v O'Connor, 27 Cal 238; Middlecoff v Hemstreet, 135 Cal 173.
7. Bell v Sage, cited supra, footnote #6; Perkins v Farmers Bank, 12 Cal App (2) 495; Frederick v Louis, 10 Cal App (2) 649.
8. Forman v Wallace, 75 Cal 552.
9. Spect v Gregg, 51 Cal 198; Fresno Canal Co. v Rowell, 80 Cal 114; Bell v Sage, cited supra, footnote #6 intimates contra, but note in 11 California Law Review, p. 205 states this is contrary to the other cases. When instrument acknowledged by grantee only see Keese v Beardsley, 190 Cal 465. 11 California Law Review, p. 205 states it is the custom to record contracts for sale of property acknowledged by the grantee alone, but their record is without value as constructive notice.
10. Bell v Sage, cited supra, footnote #6.
11. Lee v Murphy, 119 Cal 364; Landers v Bolton, 26 Cal 393; Hastings v Vaughn, 5 Cal 315.
12. Hammond Lumber Co. v Roubian, 137 Cal App 155; Henrici v So. Feather Land Co., cited supra, footnote #6; Hastings v Vaughn, cited supra, footnote #11. This rule does not apply to homesteads, Lee v Murphy, cited supra, footnote #11.
13. Mayhew v Melby, cited supra, footnote #6.
14. 137 Cal App 155.
15. 177 Cal 442.

16. 119 Cal 364.
17. Keese v Beardsley, cited supra, footnote #9. 11 California Law Review p. 205; Weatherbee v Sinn, 73 Cal 98.
18. Fresno Canal v Howell, 80 Cal 114.
19. 60 Cal App 149, cited supra, footnote #6.
20. 51 Cal 198, cited supra, footnote #9.
21. 80 Cal 114, cited supra, footnote #18.
22. 122 Cal App 732.
23. 11 California Law Review, p. 205, cited supra, footnote #9.
24. McMinn v O'Connor, cited supra, footnote #6.
25. 36 Cal 691.
26. 89 Cal 245. See also Sepulveda v Apalbas, 25 Cal App (2) 381; Hager v Spect which involved a conveyance made without authority, 52 Cal 577; Heley v Collins, 41 Cal 663.
27. Racouillat v Sansevain, 32 Cal 376; Racouillat v Rene, 32 Cal 450.

Chapter 8: EFFECT OF ERRORS IN THE RECORDED INSTRUMENT OR THE RECORDING PROCESS (By University of Southern California)

I. INTRODUCTION

When an instrument which is authorized by the general recording statute is properly recorded (transcribed and indexed) after the formal prerequisites have been complied with, the various effects as discussed in Chapter 6 will follow. These include the following:

(1) The grantee will have priority over subsequent purchasers and mortgagees who record their instruments later. This is based on the fact that the grantee by recording has maintained the common law priority which is the result of being the first grantee in point of time.

(2) The grantee will have priority over prior purchasers who have failed to record or who record subsequently. This is based on Civil Code Section 1214 which makes a prior unrecorded instrument void as against a subsequent bona fide purchaser who first records. Of course, the grantee claiming protection under Civil Code Section 1214 must prove he purchased for value, in good faith, without notice of the prior conveyance, and that he properly recorded his instrument first.

(3) The record of the instrument will impart constructive notice to subsequent purchasers of the same property in the same chain of title. This prevents a subsequent purchaser from claiming as a bona fide purchaser without notice since he has notice from the record of the instrument. Many courts apply this reasoning when it would be sufficient to hold that a prior purchaser who records first properly preserves his common law priority. It is not necessary in such a case to hold that the subsequent purchaser was put on notice from the record and therefore, cannot claim as a bona fide purchaser and will take subject to the prior recorded instrument. The courts continue to decide these cases on the basis of constructive notice, however. The special situations in which discussion of constructive notice is necessary were covered in detail in Chapters 1 and 6.

(4) The instrument may be offered in evidence without further proof of execution.

When errors occur in the recording process an instrument is not properly recorded. Therefore, the various benefits of recording listed above should not be applicable. The instrument should be treated as if it had not been recorded. The courts generally prefer to state that the instrument does not give constructive notice to subsequent purchasers and therefore, they will take title clear of any interests acquired under that conveyance. They must, of course, meet the requirements of purchase in good faith, for value, without actual notice or notice of facts and circumstances which would lead them to an investigation and finally, they must record their instruments properly. As seen above, it is usually unnecessary to go into the question of constructive notice.

The purpose of this chapter is to discuss the extent to which the courts have failed to give protection to parties who record instruments containing errors or who record proper instruments but an error occurs in the recording process. The courts have made distinctions according to the type of errors involved. The errors may be classified as follows:

- (1) Errors made by the Recorder:
 - (a) Instrument copied into wrong book.
 - (b) Errors in indexing the instrument.
 - (c) Instrument transcribed incorrectly into proper record book.
- (2) Errors appearing in the original instrument:
 - (a) Errors in description of property.
 - (b) Errors in instrument due to typographical errors (other than errors in description).
 - (c) Error in name of the grantee.

II. ERRORS MADE BY THE RECORDER:

A. INSTRUMENT COPIED INTO WRONG BOOK

The recorder is required to keep sets of books in which he copies the documents which are deposited with him for record. The recorder may keep a different set of books for each type of document which he is required to record. That is, he may keep a series of books entitled "deeds," a series entitled "mortgages," *et cetera*. In lieu of these individual books, he may keep one series of books entitled "Official Records" in which he copies all the instruments deposited with him for record. For example, he will copy deeds, mortgages, trust deeds, etc. all into the same book in the order in which they are deposited for record. If the separate books are used, however, for the different types of instruments, a problem arises if an instrument is copied into the wrong book. This problem would not be so likely to occur when the one series of books is used, although the instrument could be copied into the wrong volume of "Official Records" or not copied at all. The Government Code provisions relating to the books kept by the recorder are discussed in Chapter 4. These provisions were formerly in the Political Code.

The leading case involving copying of instruments into the wrong book is Cady v Purser,⁽¹⁾ decided under the provisions in the Political Code involving the recording procedure, which have now been transferred to the Government Code. In this case a prior mortgage had been deposited with the recorder for record, but had been copied into a book entitled "Bills of Sale and Agreements." According to the statutes applicable at that time the mortgage should have been copied into a book entitled "Mortgages." A subsequent bona

fide purchaser of this property was held to take title without notice of this mortgage, on the basis that when an instrument is recorded in the wrong book of records it fails to operate as constructive notice to subsequent purchasers. Therefore, if a subsequent purchaser acquires title to the property in good faith, for value, without notice, and records first, he will prevail over the prior mortgagee. According to the terms of Civil Code Section 1214 this would be the result. The court construed Civil Code Sections 1170 and 1213 together and concluded that an instrument must be properly recorded in order to give constructive notice.

The court stated, in discussing the requirements of recording:

"The policy of the law in this respect is to afford facilities for intending purchasers or mortgagees of land in examining the records for the purpose of ascertaining whether there are any claims against it, and for this purpose it has prescribed the mode in which the recorder shall keep the records of the several instruments; and an instrument must be recorded as herein directed in order that it may be recorded as prescribed by law. If recorded in a different book from the one directed, it is to be regarded the same as if not recorded at all."

The court then held that failure to record rendered the deed void as against the subsequent purchaser.

The court discussed the problem of constructive notice from the record unnecessarily. It would have been sufficient for the court to have limited its discussion to the holding that an error in copying the instrument such as occurred here made the situation the same as if it had never been recorded. The mortgagee then had failed to preserve his common law priority and a subsequent purchaser in good faith, for value, without notice, who properly recorded his instrument would have priority according to Civil Code Section 1214.

There are, therefore, two results of such an error:

- (1) The instrument is treated as if never recorded.
- (2) The record of such an instrument is not constructive notice to subsequent purchasers.

The philosophy on which the rule in Cady v Purser is based is that the person who deposits an instrument for record has the better opportunity of detecting the error by reading the record after the instrument has been copied. Therefore, the burden of correct transcription should be placed on him.

The court in Cady v Purser relies on Chamberlain v Bell(2) and Donald v Beals(3) which both held a subsequent purchaser could rely on the state of the record if an error had been made in recording. These cases involved errors or omissions in copying, but did not involve recording in the wrong book. They

are discussed below in the section on incorrect transcribing.

Prior to Cady v Purser there had been some cases deciding that for certain purposes the filing of an instrument is considered to be recording of that instrument. These included the filing of a declaration of homestead and the filing of an assignment of an interest in real property for the benefit of creditors. In Quackenbush v Reed(4) it was held that filing a declaration of homestead created the homestead, even though the statute required such declaration to be recorded. A subsequent error in transcribing (omission of part of the acknowledgment) the instrument did not affect the character of the property. As to homestead property, the declaration need not be properly copied into the correct book. The court in Cady v Purser distinguished this type of case by stating that where filing is an essential step in perfecting a right, proper copying will not be required. Where the purpose of recording is to give constructive notice to subsequent parties, however, the instrument must be properly recorded in the proper book before any constructive notice will be imparted from the record.

The case of Watkins v Wilhoit,(5) also prior to Cady v Purser involved the filing of an assignment for the benefit of creditors. The assignment was subsequently recorded in the wrong book. The court concluded that the assignment will be considered "recorded" when filed as against creditors in existence at the time of the assignment. In order to operate as constructive notice to subsequent purchasers and mortgagees, however, the assignment must be recorded in the same manner as transfers of real property, if the assignment involves real property which it did in this case. This requires proper copying into the proper book.

As against creditors the court held Civil Code Section 1170 applied which states: "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record." In order to operate as constructive notice to subsequent purchasers and mortgagees it is necessary to comply with Section 1213, however, which reads as follows: "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees;..."

Therefore, a distinction is made in certain cases as to when an instrument is recorded and whether proper copying is necessary. The conclusion is that proper copying into the proper book is a necessary part of recording in order for the benefits of the recording statute to apply. For certain other purposes, however, this is not required. For example, for the creation of a homestead.

Another case prior to Cady v Purser was Meherin v Oaks(6) involving recording of chattel mortgages. Such mortgages are required to be recorded in the same manner as conveyances of real property. The case of Meherin v Oaks applied a theory different from Cady v Purser and stated that the grantee had fulfilled his duty by depositing the instrument for the record with the proper officer as required by Civil Code Section 1170. There was nothing more than this that he

was required to do. This put the burden on a subsequent purchaser to determine whether the instrument was properly copied. If it was incorrectly copied, the subsequent purchaser would still be put on notice of the terms of the original instrument. The error in this case involved the omission of the verification and part of the acknowledgment when the instrument was copied by the recorder, but the court held the subsequent purchaser would be charged with notice of the contents of the instrument in spite of this defect. The court in Cady v Purser held this was dictum in the Meherin case and refused to apply that theory, since in the Meherin case the subsequent purchaser had actual notice.

Other authorities have felt that the Meherin case stands for an entirely different rule ignoring the fact that the statements contained therein are purely dictum. These authorities apply a practical approach and say that the case stands for the proposition that an error in copying which is not material and does not involve the contents of the instrument will not prohibit the record from operating as constructive notice. This theory has been applied in several cases discussed below.

This section deals mainly with recording in the proper book but in order to have a complete picture, it has been necessary to discuss some cases involving errors in transcribing when the instrument has been copied into the proper book.

There are a few cases involving the question of what is the proper book. Kent v Williams(7) held that a contract affecting real property was properly recorded in a book marked "Covenants". A water right contract(8) and a contract for the sale of land(9) were held properly recorded in a book entitled "Miscellaneous Records". The case of Page v Rogers(10) held that since the statute then in effect did not require copying of certificates of sale but merely required filing, it was proper for the recorder to file a sheriff's certificate of sale with recorded deeds after copying it into the deed book and indexing it as a deed. In the case of Fogarty v Sawyer(11) a mortgage containing a power of sale was recorded in the book for "mortgages". The court held this was the proper book and it was not necessary for the instrument to be recorded also in the powers of attorney book. Recording in the mortgages book gave subsequent purchasers constructive notice of the contents including the power of sale.

In 1909, Political Code Section 4135a(12) was enacted providing that the record would impart constructive notice to subsequent purchasers even if the instrument had been copied into the wrong book, provided the instrument was indexed in the proper book. In 1947, this provision was transferred to Government Code Section 27327. The case of Central Pacific Ry. Co. v Droge(13) intimated that such instrument copied into the wrong book, but indexed in the proper book, would be admissible in evidence without further proof of execution. This would be logical since the instrument would be considered a recorded instrument and all the benefits of recording should be applicable.

In addition to being indexed in the proper book, the instrument must be properly indexed in that book. This problem of correct indexing as a requisite for constructive notice and the other benefits of recording is discussed below.

B. ERRORS IN INDEXING THE INSTRUMENT

The Government Code provides for the type of indices which the recorder may keep. He has an option of keeping one series of indices entitled "General Index of Grantors" and "General Index of Grantees". The grantors and grantees are alphabetically listed in these respective indices. The name of the instrument is then inserted with a reference to the book and page where the instrument has been copied into the "Official Records". The recorder may prefer to keep separate indices for each type of instrument. Such indices are used when the documents are copied into separate books for each class of document. For example, he may have two indices to the book in which mortgages are recorded. These will be called "Index of Mortgagors of Real Property" and "Index of Mortgagees of Real Property." The indices are discussed in more detail in Chapter 4, "Manner of Recording."

If an error is made in indexing it would be impossible to locate the instrument. The only way it could be done would be by checking the record books page by page, which would be hopeless. The only other alternative would be to refer to the records of the private title companies which are kept on a geographical system. The recording system would not be serving its purpose of giving people an opportunity to discover the record of instruments affecting their title.

There is a split of authority in the United States on the question of whether an instrument must be properly indexed in order to protect the grantee against prior unrecorded instruments or against subsequent purchasers who record later. One view is that the grantee should be protected regardless of an error in indexing provided the instrument is properly copied into the correct book. It is argued that the object the index is meant to achieve is to help persons searching the records to find the instruments on record, but it is not part of the recording process.

The California view and that followed in many states is that the index constitutes one of the official records of the state and should be properly kept in order to give constructive notice of an instrument otherwise properly recorded. The California view has been that the recorder is the agent of the grantee and the grantee will have to suffer the loss if an error occurs in recording. This is applied when an instrument is improperly indexed the same as it applies when an error has occurred in copying the instrument into the record books.(14)

The case of Rice v Taylor(15) affords an illustration of a type of error in indexing. A mortgage on real property was filed and properly recorded in the "Official Records" but indexed in the "General Index" as a "Note and Pledge as Security", rather than as a mortgage. A subsequent purchaser of the property who had no actual notice of this mortgage claimed he took title free of such mortgage since it was improperly indexed and he would not be put on notice of the mortgage from this erroneous indexing.

The court after determining that California has an "index" system of recording held that the manner of indexing used in the case of Rice v Taylor

failed to give constructive notice to a subsequent purchaser of the real property. The court stated as follows:

"Here a reading of the index alone would not even suggest a real estate encumbrance but, on the contrary, a transaction respecting chattels would come to the mind. While the word 'pledge' may in certain connections be loosely used to denote a real estate encumbrance as well as one of chattels, still, where standing alone as a subject without qualifying surroundings, we cannot see how it can be said that real estate is even hinted at. If the index is to be held material at all it must give some direct reference to the true nature of the instrument referred to."

This case leaves a question as to what the result would be if a mortgage were indexed as a deed or a different type of real property encumbrance. It would seem that a purchaser searching the records would be put on notice of the actual type of instrument since in such a case the purchaser would be interested in any type of instrument affecting the real property whether it were a deed, mortgage or other encumbrance. He would be put on inquiry by the index and should examine the instrument recorded to find out its contents. In so doing he would be able to find what kind of an instrument it actually was. This is clearly distinguishable from indexing a real property mortgage as an instrument apparently affecting personal property only.

A situation which is related to this problem is that of constructive notice to a subsequent purchaser of the real property when a chattel mortgage on fixtures has been recorded. This was discussed in a former chapter, but is pertinent at this point. When a chattel mortgage on fixtures is properly recorded and indexed as a chattel mortgage, a subsequent purchaser of the real property will not be put on notice of this chattel mortgage. The theory for this rule is the same as discussed in Rice v Taylor. A purchaser checking the index who comes to a chattel mortgage would not consider that it involved real property, but only personal property. He is not required to look at the record of such instrument to see if it covers fixtures rather than chattels not attached to the land.(16) In actual practice, a chattel mortgagee to be fully protected would record his chattel mortgage and ask that it be indexed as a mortgage on real property as well as indexed as a chattel mortgage. In this way he would be protected against subsequent chattel mortgagees and subsequent purchasers of the real property.

Mortgages on crops are treated differently. Under the provisions of Civil Code Section 2955, mortgages may be made on all growing crops, including grapes and fruit. The court held in Congdon v Wagner(17) that a crop mortgage when properly recorded will give constructive notice to all the world. Any person dealing with such land or purchasing it subsequently will be held bound by the mortgage on the crops. The basis for this is that a crop mortgage is indexed as a crop mortgage rather than as a chattel mortgage. Subsequent purchasers of the real property would be put on notice from the index that such mortgage affected crops. They would then check the crop mortgages in the chain of title to discover whether they involved crops on the particular piece of property they were purchasing. When a mortgage on fixtures is indexed as a chattel mortgage

there is no indication to a subsequent purchaser that fixtures are involved. Therefore, it is advisable to request that a chattel mortgage on fixtures be indexed also as a mortgage on real property. This would not be necessary in the case of a crop mortgage, however, since the term crop mortgage indicates it involves something which is a part of the land.

Conditional sales contracts and leases covering fixtures are treated in the same manner as chattel mortgages on fixtures. There is some dictum in the cases to the contrary, but it seems to be unfounded.(18)

Another type of error is an incorrect reference to the book and page where an instrument has been copied into the record books. It would seem that such an error would deprive the record of the operation of constructive notice which it might otherwise have. According to Rice v Taylor(19) the indexing must be correct and since the book and page reference is part of the indexing it would seem that it would have to be correct also. Of course, it could be argued that the index would put a subsequent purchaser on notice of a fact which he should investigate. He would then have to make a reasonable investigation to discover the instrument referred to in the index. This problem has apparently not been decided in California.

C. INSTRUMENT TRANSCRIBED INCORRECTLY INTO PROPER RECORD BOOK

These errors usually consist of an error in copying such as omission of a portion of a description, omission of the certificate of acknowledgment, transposition of letters, errors in description, et cetera.

The general attitude of the California courts in such situations is to hold that the record is constructive notice only of the record as it appears in the record books. It is not constructive notice of any portions omitted and it is not notice of the correct item when it has been incorrectly copied. The basis for this rule is that the one who offers the instrument for record has the better opportunity of detecting and correcting the error. He is, therefore, the one who must suffer the loss.

This rule was established by the early case of Chamberlain v Bell(20) decided under the 1850 statute on Conveyances. This case held that a subsequent purchaser would not have notice of the conveyance of a portion of the area described in a recorded deed but omitted from the description by the recorder in copying the instrument. The court stated the design and intention of the act was to give constructive notice of facts which appeared on the face of the record, and could not operate as constructive notice of such portions of the deed as through mistake or carelessness, were not entered of record.

This rule has been followed in a much later case, People v Southern Pac. R.R. Co.(21) in which the recorder had omitted the description of a highway in a map when it was copied into the record books. The court held that purchasers who bought property in the area covered by that map received a title clear of of this highway.

In the case of Donald v Beals(22) the error made by the recorder consisted of copying the wrong date of deposit of a mortgage into the record books. The effect of this was to make the record appear as if this mortgage had been filed before another mortgage given on the same property which had in fact been recorded later. The correct dates of filing had been endorsed on the instruments themselves when they were filed. As was discussed formerly, when two instruments have been recorded properly with no errors, priority depends on a determination of which was properly copied into the record books first. The court in Donald v Beals held that the date appearing on the instruments did not affect the priority between these two instruments. The one which appeared by the record books to be prior in time was given priority even though it had been deposited later. This is another illustration of the rule that the record as it appears in the record book will be controlling even though an error has occurred in copying.

It would seem that the same result should follow if the filing number stamped on the instrument when it is received is incorrectly copied.

It should be noted, however, that if the instrument as recorded states what priority it is to have, an error in recording one before the other or giving one a lower filing number than the other will not affect the true priority. In Phelps v American Mortgage Co.(23) two instruments were recorded. One stated it was to have priority over the other. However, an error was made and this instrument was not recorded until after the other one. The court held the priority in such a case depended on the statement in the instruments and not on the question of which instrument was first recorded.

The rule established by Chamberlain v Bell has been departed from occasionally when an error of minor importance has occurred. For example, in Dawes v Tucker(24) a trust deed was recorded with a provision that publication was to be once a week in case of foreclosure. In copying this instrument the recorder made an error and copied it as "twice" a week. A subsequent purchaser claimed that since an error in recording had occurred he should take title free of such trust deed. The court stated, "We do not think, however, that the error of the recorder in the instant case was of such consequence as to render the recordation of the instrument in respect to which it happened entirely and utterly void." Since the material items, such as the names, description of the property, et cetera were correctly copied, the court held that an immaterial error would not prejudice the subsequent party. He could easily find out what the proper requirement for publication was. This theory puts a purchaser on inquiry as to the true contents of the document as to immaterial items. This is a satisfactory theory when immaterial items are involved. If carried too far, however, it would destroy the entire purpose of the recording system and require a purchaser to look behind the record to the original document in every instance. As stated before, the burden of errors should rest with the grantee, not the subsequent purchaser.

III. ERRORS APPEARING IN THE ORIGINAL INSTRUMENT

A. ERRORS IN DESCRIPTION OF PROPERTY

The rule generally applied by the courts when an error appears in the instrument and is copied into the record is that the record is notice of the contents of the instrument as recorded. The subsequent purchaser may rely on the state of the record as it appears.

For example, in Davis v Ward,⁽²⁵⁾ the leading case on this subject, a mortgage had an incorrect description of the property so that it appeared that the mortgage covered land several miles away rather than the actual land it was intended to cover. A subsequent purchaser of the land intended to be covered by the mortgage was held not to be subject to this mortgage since the record did not indicate it actually covered this property the purchaser was purchasing.

There are some cases limiting this rule which place the burden of discovering an immaterial error in description on the purchaser. An example of this is where the description refers to the wrong map book but there is only one map book in existence covering that area. In such a situation, it has been held that a subsequent purchaser is put on inquiry to discover this map and is put on notice of the proper description, including the proper reference to the map for that area.⁽²⁶⁾ The purchaser in such a case must look behind the record to find the map covering the area mentioned in the deed and determine whether the deed involves the specific property he is interested in purchasing. The problem of what is a sufficient description depends on the facts in each case and is decided as each case is presented.⁽²⁷⁾ The same is true of the question of whether an error is material or immaterial.

B. ERRORS IN INSTRUMENT DUE TO TYPOGRAPHICAL ERRORS

If the error is minor, such as the transposition of letters, it has been held that the record gives constructive notice of the instrument. A subsequent purchaser is put on inquiry to investigate what the parties to that instrument originally intended. For example, a deed in the purchaser's chain of title contained a description referring to the San Bernardino Meridian. Instead of using the letters S.B. & M. the letters were transposed and read B.M. & S. Such an error is obvious to one searching the records and held easily discoverable. It would be too harsh to hold that an error of such a nature makes the instrument invalid as against a subsequent purchaser.⁽²⁸⁾

Gray v Maier & Zobelein Brewery⁽²⁹⁾ enunciates this rule very clearly by stating that the instrument imparts such notice as a fair and reasonable construction thereof would indicate as the meaning of the terms employed. The lease involved in this case stated that the party of the first part (the lessor) had a right to renew the lease at the end of the term. The subsequent purchasers who purchased the land claimed they should not be subject to the right of the lessee to renew which was what the parties to the lease had originally intended. The court held that the mistake was so obvious that the purchaser would be put on inquiry as to the true intent of the parties. A reasonable man would investigate when he read a lease giving the lessor a right to

renew since that would be a very unusual term in a lease. If he investigated he would have discovered the lease was intended to give the lessee the option. If he failed to make a reasonable investigation he would be charged with notice of what he would have discovered had he made such an investigation.

The conclusion to be drawn from these cases is that when an immaterial error has occurred either in the drawing up of the instrument or in the copying of it into the records it will not cause the record to be void as to subsequent purchasers. The record will continue to give notice to purchasers and it will be notice of the correct terms of the instrument. This is, however, limited to the situation in which the error is immaterial.

C. ERROR IN NAME OF THE GRANTEE

When the error in a deed occurs in the name of the grantee and it is a material difference in spelling, a more serious problem is presented. The grantee under such a deed if he desires to convey the property must convey in his correct name with a reference to the name by which he acquired title. If he fails to do this there will be a break in the chain of title. For example, if Brown conveys to Moore but misspells the grantee's name as More and Moore gives a mortgage to X executing it with his correct name Moore a subsequent purchaser of this property would not connect the conveyance to More with the mortgage given to X by Moore. It would be outside the chain of title and the purchaser would not be subject to it. If, however, Moore gives the mortgage with his correct name but refers to the incorrect name, More, this mortgage will be indexed under Moore and under More. A subsequent purchaser in checking the index will then discover the mortgage and be put on notice of such an instrument. The manner of indexing such matters was discussed in a former chapter.

There are many ways of correcting such an error but the desirable method is by court action to reform the deed and the filing of a lis pendens. This will give notice to subsequent purchasers from the filing of the lis pendens that the deed is subject to correction. Other methods of correction between the parties are dangerous and may result in failure to achieve the desired result.

If the name is correct in the instrument but copied incorrectly by the recorder, a court order may be acquired to correct it. The recorder may not correct it by erasure or interlineation of the record.

There are other methods of correction but a court order is advisable, because of the difficulties connected with any attempt to correct the record by the parties.(30)

This chapter has emphasized the problems that arise in connection with errors in the recording system and in the instruments which are offered for record. The theories developed by the courts have been mainly designed to protect the subsequent purchaser and allow him to rely on the state of the record. This is in keeping with the purpose of the recording act which is to give the purchaser an opportunity to discover the state of the record title and protect subsequent purchasers who purchase in good faith, for value, and without actual or constructive notice.

FOOTNOTES to CHAPTER 8: EFFECT OF ERRORS IN THE RECORDED INSTRUMENT OR THE RECORDING PROCESS

1. 131 Cal 552.
2. 7 Cal 292.
3. 57 Cal 399.
4. 102 Cal 493.
5. 104 Cal 395; prior opinion in 4 Cal Unrep 450.
6. 67 Cal 57.
7. 146 Cal 3
8. Stanislaus Water Co. v Bachman, 152 Cal 716.
9. Keese v Beardsley, 190 Cal 465.
10. 31 Cal 293.
11. 23 Cal 570.
12. Cal. Stats. 1909, p. 784.
13. 171 Cal 32.
14. 23 California Law Review, p. 107.
15. 220 Cal 629.
16. Elliot v Hudson, 18 Cal App 642.
17. 207 Cal 373.
18. See Bell v Mortgage Guaranty Co., 109 Cal App 203 and Oakland Bank of Savings v California Pressed Brick Co., 183 Cal 295, both involving conditional sales contracts. See Western Machine v Graetz, 42 Cal App (2) 296, involving a lease covering fixtures.
19. 220 Cal 629, cited supra, footnote #15.
20. 7 Cal 292, cited supra, footnote #2.
21. 68 Cal App 153.
22. 57 Cal 399, cited supra, footnote #3.

23. 6 Cal (2) 604.
24. 178 Cal 46.
25. 109 Cal 186.
26. Rogers v McCartney, 3 Cal App 34; Leonard v Osburn, 169 Cal 157.
27. Rea v Haffenden, 116 Cal 596 is an example of a description held sufficient.
28. Black Eagle Oil Co. v Belcher, 22 Cal App 258.
29. 2 Cal App 653.
30. See Ogden, M. B., Outline of Land Titles (1947) p. 578, 579, for a discussion of problems involving incorrect spelling of names.